March 22, 1872

Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~343.~~ 143

F. W. ROBINSON, E. N. ROBINSON, L. L. ROBINSON, AND S. F. BUTTERWORTH, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

All

FILED DECEMBER 6, 1870.

March 30 1872

Affirmed

Jno Davis

SUPREME COURT OF THE UNITED STATES.

No. 343.

F. W. ROBINSON, E. N. ROBINSON, L. L. ROBINSON, AND S. F. BUTTERWORTH, PLAINTIFFS IN ERROR,

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth circuit in and for the district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the United States, as plaintiff, and F. W. Robinson, E. N. Robinson, L. L. Robinson, and S. F. Butterworth, as defendants, a manifest error hath happened, as is alleged, to the great damage of the said defendants, as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on the first Monday of December next, in the said Supreme Court, to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this sixth day of December, A. D. 1869, and of the independence of the United States the ninety-fourth.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Circuit Court 9th Circuit, Dist. Cal.

The above writ of error is hereby allowed.

The answer of the judges of the circuit court of the United States of the ninth circuit in and for the district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Indorsed:) United States Supreme Court. The United States of America vs. F. W. Robinson et al. Writ of error.

1 *Complaint.*

Circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
F. W. ROBINSON, E. N. ROBINSON, L. L. ROBINSON, and S. F. Butterworth.

DISTRICT OF CALIFORNIA, *ss:*

The United States of America, by Frank M. Pixley, their attorney complains of F. W. Robinson, E. N. Robinson, L. L. Robinson, and S. F. Butterworth, defendants, of a plea that they render unto the said

plaintiff the sum of seven thousand dollars, lawful money of the United States, which they owe and unjustly detain.

For that whereas the said defendants heretofore, to wit, on the eighth day of June, in the year of our Lord one thousand eight hundred and sixty-seven, at the city and county of San Francisco, in the district aforesaid, by their certain writing obligatory, sealed with their seals, and now shown to the court, the date whereof is the day and year above named, acknowledged themselves to be held and firmly bound unto the said plaintiff in the sum of seven thousand dollars, above demanded, to be paid to the said plaintiff.

And the said plaintiff says that the said writing obligatory was made with a condition thereunder written, that if the above-named defendants, F. W. Robinson and E. N. Robinson, their heirs, executors,
2 and administrators, or any of them, should and did in all things well and truly observe, perform, fulfill, accomplish, and keep all and singular the covenants, conditions, and agreements whatsoever, which, on the part of the said F. W. Robinson and E. N. Robinson, their heirs, executors, or administrators, were or ought to be observed, performed, fulfilled, accomplished, and kept, which were comprised or mentioned in certain articles of agreement bearing date the eighth day of June, eighteen hundred and sixty-seven, between Brevet Major James F. Hoyt, assistant quartermaster United States Army, and the said F. W. Robinson and E. N. Robinson, concerning the delivery of supplies of barley and straw, (which said agreement was made and entered into by the said Hoyt for the benefit of the said plaintiff,) according to the true intent and meaning of said articles of agreement, then the said obligation was to be void; otherwise to remain in full force and virtue.

And the plaintiff further says that the said articles of agreement in the condition of the said writing obligatory mentioned (and which was duly executed by the parties thereto on the day of its date) was and is in the words and figures and of the tenor following, that is to say:

"This agreement, made this eighth day of June, A. D. one thousand eight hundred and sixty-seven, between Brevet Major James T. Hoyt, captain and assistant quartermaster in the service of the United States of America, of the one part, and F. W. Robinson and E. N. Robinson, composing the firm of F. W. Robinson & Co,, of the city and county of San Francisco, and State of California, of the other part, witnesseth: That the said Brevet Major James T. Hoyt, ass't quartermaster, for and on behalf of the United States of America, and the said F. W.
3 Robinson and E. N. Robinson, composing the firm of F. W. Robinson & Co., for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree to and with each other in manner following, viz:

"First. That the said F. W. Robinson & Co. shall, at the places hereinafter named, deliver one million (1,000,000) pounds of first quality clean barley, and five hundred thousand (500,000) pounds of clean straw, of good quality; the above-mentioned supplies of barley and straw to be delivered between the first day of July, A. D. 1867, and the thirtieth day of June, A. D. 1868, on the order of the said Brevet Major James T. Hoyt., A. Q. M., as aforesaid, or his successor, at such times and in such quantities as may be required for the use of the troops, and to be delivered at the following posts, viz: Fort Point, Presidio, Point San José, Camp Reynolds, Alcatraz Island, and San Francisco City. The precise points at each of the above posts where the same shall be delivered shall be designated by the acting assistant quartermasters of the respective

posts. The portion of the same deliverable in the city of San Francisco shall be delivered at such places in said city as the said Brevet Major James T. Hoyt, A. Q. M., or his successor, may direct.

"Second. The said Brevet Major James T. Hoyt, A. Q. M., or his successor, shall direct and determine from time to time, within the period aforesaid, what proportion of the said supplies of barley and straw shall be delivered at each of said posts and places.

4 "Third. The United States reserves the right to accept such less quantity of the before-mentioned supplies, or either of them, or require such greater quantity of each than the amount hereinbefore specified, as may be required for consumption at the said posts during said period; all the supplies subject to inspection at the place of delivery.

"Fourth. The said F. W. Robinson & Co. shall receive ninety-five one-hundredths ($\frac{95}{100}$ cts.) per pounds for each and every pound of barley, seven dollars ($7 00) per ton for each and every ton of straw delivered and accepted under this contract at the posts and places hereinbefore stated, in gold coin of the United States, or its equivalent in the legal currency of the Government of the United States of America, on the day of payment; payments to be made in San Francisco at the end of each month for any part of the above-mentioned supply of barley and straw delivered during the month on the order of the said Brevet Major James T. Hoyt, A. Q. M., or his successor, and certified to by the acting assistant quartermasters receiving the same, should the Quartermaster's Department be in funds; if not, then as soon as funds may be received for that purpose.

"Fifth. That whenever and as often as the barley and straw specified to be delivered under this contract, or any part thereof, shall, in the opinion of the commanding officer at the place of delivery, be unfit for issue, or of a quality inferior to that required by this contract, a survey shall be held by two officers, to be designated by the commanding officer, and, in case of disagreement, a third person shall be chosen

5 by these two officers; the three thus appointed and chosen shall have power to reject such parts or the whole of said barley and straw as appears unfit for issue, or of a quality inferior to that contracted for.

"Sixth. That in case of failure or deficiency in the quantity of the barley and straw herein contracted to be delivered, then the said Brevet Major James T. Hoyt, A. Q. M., or his successor, shall have the power to supply the deficiency by purchase in open market; and the said F. W. Robinson & Co. shall be required to pay the difference in cost, if any, in gold coin of the United States, or its equivalent in the legal currency of the Government of the United States.

"Seventh. No member of Congress, officer or agent of the Government, or person employed in the public service, shall be admitted to any interest, share, or part in, or to any benefit to arise from, this contract.

"Eighth. It is expressly provided that this contract may be terminated at such time as the Quartermaster General may direct, and is made subject to the approval of the division and departmental commanders.

"In witness whereof the undersigned have hereunto placed their hands and seals the day and year first above written.

"JAS. T. HOYT, [SEAL.]
"*Capt. & A. Q. M., & B. Maj.*
"F. W. ROBINSON. [SEAL.]
"E. N. ROBINSON. [SEAL.]

"Witness: D. S. WIGGINS."

Int. rev. stamp, 5 cents, canceled.]

By which said articles of agreement, the same having been duly
6 approved by the division and department commanders, the said F. W. Robinson and E. N. Robinson, covenanted and agreed, by and with the said Hoyt, acting for and on behalf of the said plaintiff, to deliver the said articles of goods and chattels at the times and in the manner, and at the prices in said articles of agreement mentioned, for the use and benefit of the said plaintiff.

And the plaintiff avers that the said Hoyt did faithfully perform and keep each and every the covenants and stipulations in said articles of agreement to be performed and kept on his part, but that the said F. W. Robinson and E. N. Robinson, or either of them, did not observe perform, accomplish, or keep the covenants, conditions, or agreements mentioned in the said articles of agreement.

And the said plaintiff, for assigning a breach in the said condition of the said articles of agreement, says, that the said defendants, F. W. Robinson and E. N. Robinson, in the months of January and February, 1868, neglected and refused to deliver the amount of sixty-one thousand seven hundred and twenty-six pounds of barley, although the same was duly demanded of them under the said articles of agreement, and according to the terms thereof, the same being then and there required for the use of said troops; and in consequence of such neglect and refusal, and for the purpose of supplying the deficiency caused thereby, the said plaintiff was obliged to purchase, and did purchase, for the use of said troops, in open market, and at a much greater price than that named in said articles of agreement, the said amount of sixty-one thousand seven hundred and twenty-six pounds of barley; whereby plaintiff was injured and sustained damages in the amount of four hundred and ninety-three dollars and eighty-one cents, in gold coin of the United States.

7 And for a further breach of the condition of the said articles of agreement, the said plaintiff says, that the said defendants, F. W. Robinson and E. N. Robinson, in the month of March, 1868, neglected and refused to deliver the further amount of fifty thousand six hundred and sixty pounds of barley, although the same was duly demanded of them, under the said articles of agreement, and according to the terms thereof, the same being then and there required for the use of said troops; and in consequence of such neglect and refusal, and for the purpose of supplying the deficiency caused thereby, the said plaintiff was obliged to purchase, and did purchase, for the use of said troops, in open market, and at a much greater price than that named in said articles of agreement, the said amount of fifty thousand six hundred and sixty pounds of barley; whereby plaintiff was injured and sustained damages in the amount of five hundred and thirty-one dollars and ninety-three cents, in gold coin of the United States.

And for a further breach of the condition of the said articles of agreement, the said plaintiff says that the said defendants, F. W. Robinson and E. N. Robinron, in the month of April, 1868, neglected and refused to deliver the further amount of sixty-five thousand nine hundred and forty pounds of barley, although the same was duly demanded of them under the said articles of agreement, and according to the terms thereof, the same being then and there required for the use of said troops; and in consequence of such neglect and refusal, and for the purpose of supplying the deficiency caused thereby, the said plaintiff was obliged to purchase, and did purchase, for the use of said troops, in open market, and at a much greater price than that named in said articles of agreement, the said amount of sixty-five thousand nine hundred and

8 forty pounds of barley; whereby plaintiff was injured and sustained damages in the amount of seven hundred and fifty-eight dollars and thirty-one cents, in gold coin of the United States.

And for a further breach of the condition of the said articles of agreement, the said plaintiff says, that the said defendants, F. W. Robinson and E. N. Robinson, in the month of May, 1868, neglected and refused to deliver the further amount of eighty thousand five hundred and thirty-eight pounds of barley, although the same was duly demanded of them under the said articles of agreement, and according to the terms thereof, the same being then and there required for the use of said troops; and in consequence of such neglect and refusal, and for the purpose of supplying the deficiency caused thereby, the said plaintiff was obliged to purchase, and did purchase, for the use of said troops, in open market, and at a much greater price than that named in said articles of agreement, the said amount of eighty thousand five hundred and thirty-eight pounds of barley; whereby plaintiff was injured and sustained damages in the amount of seven hundred and sixty-five dollars and eleven cents, in gold coin of the United States.

And for a further breach of the condition of the said articles of agreement, the said plaintiff says, that the said defendants, F. W. Robinson and E. N. Robinson, in the month of June, 1868, neglected and refused to deliver the further amount of sixty-eight thousand two hundred and forty pounds of barley, although the same was duly demanded of them under the said articles of agreement, and according to the terms thereof, the same being then and there required for the use of said troops; and in consequence of such neglect and refusal, and for the purpose

9 of supplying the deficiency caused thereby, the said plaintiff was obliged to purchase, and did purchase, for the use of said troops, in open market, and at a much greater price than that named in said articles of agreement, the said amount of sixty-eight thousand two hundred and forty pounds of barley; whereby plaintiff was injured and sustained damages in the amount of six hundred and eighty-two dollars and forty cents, in gold coin of the United States.

And for a further breach of the condition of the said articles of agreement, the said plaintiff says, that the said defendants F. W. Robinson and E. N. Robinson, between the first day of January and the thirtieth day of June, 1868, neglected and refused to deliver the amount of two hundred and four thousand one hundred and fifty-one pounds of straw, although the same was duly demanded of them under the said articles of agreement and according to the terms thereof, the same being then and there required for the use of said troops; and in consequence of such neglect and refusal, and for the purpose of supplying the deficiency caused thereby, the said plaintiff was obliged to purchase, and did purchase, for the use of said troops, in open market, and at a much greater price than that named in said articles of agreement, the said amount of two hundred and four thousand one hundred and fifty-one pounds of straw; whereby plaintiff was injured and sustained damages in the amount of eight hundred and sixteen dollars and sixty cents, in gold coin of the United States; whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendants the said sum of seven thousand dollars, above demanded. Yet the said defendants, although often requested, have not yet paid the said sum of seven thousand dollars, above demanded, or any part thereof,

10 but to pay the same have neglected and refused, and still do neglect and refuse.

Wherefore plaintiff brings this action, and prays judgment against

said defendants for the said sum of seven thousand dollars, in gold coin of the United States, and costs.

FRANK M. PIXLEY,
U. S. Attorney for California.

(Endorsed:) Filed June 10th, 1869. Geo. E. Whitney, cl'k, by H. F. Lardner, dep'y.

11 *Summons.*

UNITED STATES OF AMERICA:

In the circuit court of the United States in and for the district of California.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court in the city of San Francisco.

THE UNITED STATES, PLAINTIFF,
vs.
F. W. ROBINSON, ET. ALS., DEFENDANTS.

The President of the United States of America to F. W. Robinson, E. N. Robinson, L. L. Robinson, and S. F. Butterworth, greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein, (a copy of which accompanies this summons,) in the office of the clerk of said court, in the city and county of San Francisco, within ten days (exclusive of Sundays and day of service) after the service on you of this summons, if served in this county, or if served out of this county, then within forty days, or judgment by default will be taken against you.

The said action is brought to recover the sum of $7,000 in gold coin, being the penalty of a certain bond executed by you and delivered to the plaintiff, on the 8th day of June, 1867, conditioned for the faithful performance of the said F. W. Robinson and E. N. Robinson, of certain articles of agreement, dated June 8th, 1867, the condition of which bond plaintiff alleges to have been broken, together with costs of suit, as will
12 more fully appear by said complaint; and if you fail to appear and plead, answer, or demur as herein required, judgment by default will be entered against you and each of you.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this tenth day of June, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-third.

SEAL OF THE U. S. CIRCUIT COURT, DIST. OF CAL.

GEO. E. WHITNEY, *Clerk.*
By CHA'S W. GRANT, *D. C.*

(Endorsed:)

U. S. MARSHAL'S OFFICE,
District of California.

I hereby certify that I received the within summons on the 10th day

of June, A. D. 1869, and personally served the same on the 12th day of June, A. D. 1869, by delivering to S. F. Butterworth and E. N. Robinson, said defendants, personally, in the city and county of San Francisco, each a certified copy of said summons, and personally served the same on the 29th day of June, A. D. 1869, by delivering to L. L Robinson, said defendant, personally, in the city and county of San Francisco, a certified copy of said summons.

San Francisco, June 29, 1869.

CHA'S W. RAND,
U. S. Marshal,
By W. H. POTTS, *Deputy.*

(Endorsed:) Filed June 29th, 1869. Geo. E. Whitney, cl'k. By A. D. Grimwood, D. C.

13 *Answer.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
F. W. ROBINSON, E. N. ROBINSON, ET AL.

And now come the defendants in the above-entitled cause by John B. Felton their attorney, and for answer to the complaint of plaintiff therein—

Deny generally and specifically each and every, all and singular, the allegations in said complaint contained.

Wherefore defendants pray to be hence dismissed with their costs.

San Francisco, January 10, 1870.

JOHN B. FELTON,
Att'y for Def'ts.

(Endorsed:) Filed January 10, 1870. Geo. E. Whitney, clerk.

14 *Findings.*

In the circuit court of the United States, ninth circuit, district of California.

UNITED STATES
vs.
ROBINSON ET AL.

This cause having been tried by the court without a jury, on the 11th of April, 1870, a stipulation, in writing, waiving a jury, having been duly filed, testimony having been heard, and the cause argued by counsel, and the court being sufficiently advised, finds the following facts and conclusions of law:

The bond and contract set out in the complaint were duly executed, as alleged. Said contract contained the following covenants, to wit:

"First. That the said F. W. Robinson shall, at the places hereinafter named, deliver one million (1,000,000) pounds of first quality, clean barley, and five hundred thousand (5000,000) pounds of clean straw, of good quality. The above-mentioned supplies of barley and straw, to be

delivered between the 1st day of July, A. D. 1867, and the 30th day of June, A. D. 1868, on the order of the said Brevet Major James T. Hoyt, A. Q. M., as aforesaid, or his successor, at such times and in such quantities as may be required for the use of the troops, and to be delivered at the following posts, viz: Fort Point, Presidio, Point San José, Camp Reynolds, Alcatraz Island, and San Francisco City. The precise points at each of the above posts where the same shall be delivered shall be designated by the acting assistant quartermasters of the respective posts. The portion of the same deliverable in the city of San Francisco, shall be delivered at such places, in said city, as the said Brevet Major James T. Hoyt, A. Q. M., or his successor, may direct.

"Second. The said Brevet Major James T. Hoyt, A. Q. M., or his successor, shall direct and determine, from time to time, within the period aforesaid, what proportion of the said supplies of barley and straw shall be delivered at each of said posts and places.

"Third. The United States reserves the right to accept such less quantity of the before-mentioned supplies, or either of them, or require such greater quantity of each than the amount hereinbefore specified, as may be required for consumption at the said posts during said period. All the supplies subject to inspection at the places of delivery.

"Fourth. The said F. W, Robinson & Co. shall receive ninety-five one-hundredths cents ($\frac{95}{100}$ cents) p'r pound for each and every pound of barley; seven dollars ($7 00) per ton for each and every ton of straw delivered and accepted under this contract, at the posts and places hereinbefore stated, in gold coin of the United States, or its equivalent in the legal currency of the Government of the United States of America, on the day of payment.

* * * * * * * *

"Sixth. That in case of failure or deficiency in the quality or quantity of the barley and straw herein contracted to be delivered, then the said Brevet Major James T. Hoyt, A. Q. M., or his successor, shall have the power to supply the deficiency by purchase in open market, and the said F. W. Robinson & Co. shall be required to pay the difference in cost, if any, in gold coin of the United States, or its equivalent in the legal currency of the Government of the United States."

The contractors duly delivered, under the contract, all barley required to be delivered by them between the 1st day of July, 1867, and the 1st day of January, 1868, on or prior to the 10th day of January, 1868. A requisition was duly made, among others, on the part of the plaintiff under the contract, upon defendants Robinson, to be delivered at the Presidio for thirty thousands pounds of barley. The defendants Robinson & Co., on said 10th of January, tendered at the Presidio thirty thousand pounds of barley in bulk, the same being loose, in wagons, and not in sacks. The said barley was brought to the wharf, some six hundred yards from the place of delivery, in sacks, and then emptied out of the sacks, loose into wagons, and in that condition tendered in bulk. The defendant, th'ough the officer in charge, declined to receive the barley in bulk, and on the ground that it was not in sacks, and that they had no facilities to store in bulk. This was the only reason for declining to receive it. The barley was then taken away by defendants Robinson & Co. Of the requisitions for barley made in January, eleven hundred and sixteen pounds ordered on the 9th of January for Fort Point, were delivered by defendants Robinson & Co., and accepted in bulk by Lieutenant Weeder, in charge of that post.

17 Prior to January 1st, 1869, and to this requisition, the barley had all been delivered under the contract, in sacks—the ordinary grain sacks. The sacks had never been demanded back by Robinson & Co. or returned to him, and more than enough sacks had then been delivered, with barley before delivered, had they been returned, to hold the 30,000 pounds of barley, for which requisition had been made, and which was tendered in bulk. But at an interview in January, 1868, prior to the said tender at the Presidio in bulk, defendant Robinson said to Capt. Lord, post Q. M., at the Presidio, that he intended to get some new, finer, and more expensive sacks to deliver in, and that he should want these returned. Capt. Lord replied that he would not be responsible for them. On the next day, after the said tender in bulk, on January 11th, defendants Robinson & Co. wrote, and caused to be delivered to Maj. Hoyt, the A. U. S. quartermaster having the matter in charge and who made the requisition, the following letter:

"SAN FRANCISCO, CAL., *January 11th*, 1868.

"Capt. JAMES T. HOYT,
A. Q. M. U. S. A.:

"SIR: You will please take notice that, by reason of the refusal of the United States Government to receive the barley sent to the Presidio on the 10th inst., as per your requisition of January 1st, 1868, which said barley conformed in every respect to the requirements of our contract with the Government, dated June 8, 1867, we hereby decline to furnish any more barley to the Government under said contract, and shall consider said contract in all respects rescinded by the action of the Government.

"Very respectfully,

"F. W. ROBINSON & CO."

18 On the 13th of the same month said Maj. Hoyt sent to the defendants, Robinson & Co., a letter, of which the following is a copy, which letter was duly received by them:

"JANUARY 13TH, 1868.

"Messrs. F. W. ROBINSON & Co.,
"*San Francisco.*

"GENTLEMEN: In reply to your note of the 11th inst., received this day, declining to furnish any more barley on your contract with the Government, dated June 8th, 1867, I have the honor to say that the Government has not in any manner rescinded your contract or released you from your obligations therein stipulated, and that you will be held to a full compliance with its provisions. I shall call upon you for the barley, from time to time, as required for consumption at the posts and places mentioned in your contract, and you will be required to furnish the same.

"Very respectfully,

"JAMES T. HOYT,
"*Captain & A. Q. M. U. S. A.*"

On the 16th of the same month said Maj. Hoyt sent to defendants, Robinson & Co., a letter relating to said requisition of 30,000 lbs. barley, of which the following is a copy:

"JANUARY 16TH, 1868.

"Messrs. F. W. ROBINSON & Co.

"GENTLEMEN: I am informed by the post quartermaster at the

19 Presidio that you have not delivered the barley at that post, ordered by me for this month. I have therefore to request that you will deliver the same immediately.

"Respectfully, your ob't servant,

"JA'S T. HOYT,
"*Captain and A. Q. M. U. S. A.*"

And subsequently, on the same day, another letter, of which the following is a copy:

"JANUARY 16TH, 1868.

"Messrs. F. W. ROBINSON & Co.

"GENTLEMEN: Learning that you have made no provision to supply the 30,000 lbs. of barley to the Presidio, as ordered and further requested in my note of to-day, this is to notify you that if the barley is not delivered at the Presidio to-morrow I shall supply the deficiency by purchase in open market, and you will be required to pay the difference in cost, if any, in gold coin or its equivalent, as stipulated in your contract.

"Very respectfully, your ob't servant,

"JA'S T. HOYT,
"*Capt. and Ass't Quartermaster U. S. Army.*"

On the 3d of February said Maj. Hoyt addressed to defendants, L. L. Robinson and S. F. Butterworth, sureties for said Robinson & Co., a letter, of which the following is a copy:

20 "FEB'Y 3RD, 1868.

"To Messrs. L. L. ROBINSON and S. F. BUTTERWORTH,
"*San Francisco, Cal.*

"GENTLEMEN: You are hereby notified that F. W. Robinson and E. N. Robinson, composing the firm of F. W. Robinson & Co., contractors with the Government of the United States for the delivery of barley and straw in San Francisco, and at the posts in and around the harbor of San Francisco, by contract with the undersigned, dated June 8th, 1867, and for the faithful performance of which contract on the part of said F. W. Robinson & Co. you are the sureties, have declined to furnish any more barley or straw under said contract, and entirely neglect and fail to fill my orders for the same. I shall, therefore, proceed to supply the deficiency by purchasing in open market, from time to time, such amount of barley and straw as may be required at the posts and places mentioned in said contract up to the 30th day of June, 1868, and that said F. W. Robinson & Co., with yourselves as sureties, will be held for the payment to the United States of the increased difference in cost, if any, in gold coin of the United States, or its equivalent in legal currency of the Government.

"Respectfully, your obedient servant,

"JA'S T. HOYT,
"*Capt. & Ass't Quartermaster U. S. Army.*"

21 A copy of said letter was sent to defendants, Robinson & Co., by a messenger, but was not received by them. Said Capt. Hoyt delivered said letter to said defendant L. L. Robinson, in person, but it does not appear that it was brought to the notice of defendant Butterworth. Before writing said letter to L. L. Robinson said Capt.

Hoyt made an effort to find defendant F. W. Robinson for the purpose of making further demand of the barley, but did not succeed, he having left town, and being at that time superintending a mining operation in Nevada Co. He gave up the effort to find said F. W. Robinson, because he was out of town at the time, and he did not think it necessary to make any further demand; said L. L. Robinson, who is a brother of said F. W. Robinson, having also stated to him "that he need not make any further demand on that contract; that the United States had forfeited by declining to receive the barley, and that they had taken counsel and were not liable."

No further requisitions or demands were thereafter made on said Robinson & Co.; but without further requisitions or demand upon, or notice to said Robinson & Co., or their sureties, the plaintiff, through said Major Hoyt, went into open market at San Francisco, from time to time, as barley and straw were required at the several posts specified in said contract, and purchased at the usual market price the amount of barley and straw required for the use of the said military posts from the time of said refusal to furnish any more barley under said contract down to the time of the expiration of said contract, June 30th, 1868. From Jan'y 10th to June 30th, 1868, there were purchased from time to time in open market, at the usual market prices, in San Francisco, large amounts in each month, as alleged in said complaint, making in the aggregate three hundred twenty-seven thousand one hundred
22 and four (327,104) pounds of barley, and two hundred four thousand one hundred and fifty-one (204,151) pounds of straw; and the amount paid for said purchases at the regular market price, over and above the contract price, was in the aggregate four thousand forty-eight dollars and sixteen cents, ($4,048 16,) in coin.

At the time the contract in question was made, it was the usage of the trade in the State of California, and it always had been prior to that time, to deliver barley in sacks, unless it was otherwise expressly specified in the contract. It was the usage of trade in the State, when barley or other grain was purchased without saying anything about sacks, to deliver in sacks. And in case of the purchase of a specified amount of barley, as one million pounds, it was always expected that it would be delivered in sacks, unless otherwise specified in the agreement. The market quotations of grain always included the sacks. Grain in this State was then packed by the producer, and all subsequent sales, according to the commercial usage, included the sack, until it finally went to the consumer. The sack usually holds from 100 to 115 pounds; some are smaller, and some larger, and, in the sale, it is weighed with the grain. In 1868 sacks cost about 17 cts. each. They have sometimes cost as high as 35 cts. each. Ordinary sacks weigh from 12 ounces to one pound, but go with the grain to the purchaser at the same price as the grain, according to the usage of the trade in California and San Francisco, when nothing is said about the sacks.

And, as conclusions of law, the court finds:

That under the contract, construed with reference to the subject-matter and usage of trade in California at the time it was made, the defendants, Robinson & Co., were bound to deliver the barley in sacks; that the refusal to make any further delivery of barley
23 under the contract, in consequence of the refusal by the plaintiff to receive the barley tendered in bulk, and a notification that they should regard the contract as rescinded by the United States, was a total breach of the contract.

That it was not necessary thereafter to make any further demands

or requisitions, or take any other steps than such as were taken, as stated in the finding of facts, to charge the defendants with liability for the breach of the contract on their part.

That the plaintiff has sustained damage to the amount of four thousand and forty-eight $\frac{16}{100}$ dollars in gold coin, and is entitled to a judgment for said amount in gold coin.

Let judgment be entered accordingly.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed 8th July, 1870. L. S. B. Sawyer, clerk.

24 *Judgment.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES
vs.
F. W. ROBINSON ET AL. } No. 798.

This cause having come on regularly for trial before the court, sitting without a jury, a trial by jury having been expressly waived by the counsel for the respective parties, on the 11th day of April, A. D. 1870, being a day in the February term, 1870, of said court, L. D. Latimer, esq., U. S. att'y, appearing for the United States, and J. B. Felton, esq., for the defendants, and witnesses on the part of plaintiff and defendants having been duly sworn and examined, and the evidence closed, the cause having been submitted to the court for consideration and decision, and, after due deliberation thereon, the court having, on the 8th of July, 1870, being a day in the June term, 1870, of said court, filed its finding in writing, and ordered that judgment be entered in accordance therewith:

Now, therefore, by reason of the law and the finding aforesaid, it is considered and adjudged that the United States, plaintiff herein, do have and recover of and from F. W. Robinson, E. N. Robinson, L. L. Robinson, and S. F. Butterworth, defendants herein, the sum of four thousand and forty-eight $\frac{16}{100}$ dollars in gold coin, damages, and the costs in this behalf expended, taxed at forty-four & $\frac{10}{100}$ dollars.

Judgment entered this 8th day of July, A. D. 1870.

L. S. B. SAWYER, *Clerk.*

25 *Bill of exceptions.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
F. W. ROBINSON AND OTHERS. } Bill of exceptions.

Be it remembered that, upon the trial of the above-entitled cause in this court before the Hon. Lorenzo Sawyer, judge of said court, sitting without a jury, a jury trial having been expressly waived by the parties, it became necessary for the plaintiff, to sustain the issues on its

part, to prove a custom or usage, to deliver barley in sacks sufficient to make it obligatory upon the defendants, F. W. Robinson and E. N. Robinson, to deliver the barley, agreed to be delivered by them under the contract set forth in the complaint, only in sacks. To prove such custom or usage the plaintiff called as a witness—

CHARLES CLAYTON, who, being sworn, testified as follows:

I was in the grain business, in this city, in 1867 and 1868. We do our share of the business, I believe. I know the market value of barley from January to July, 1868.

(Plaintiff then offered to show, by witness, the market price of barley at the time the purchases were made; defendants objected on the ground that the proposed testimony was irrelevant; objection overruled, and defendants excepted.)

Witness proceeded: In January the price ranged from $1 75
26 to $1 95 per hundred; in February, $1 75 to $1 90; March, $2 00
per 100 pounds; April, 1 95 to $2 10; May, $1 75 to $1 90; June, $1 85 to $2 00. I do not know the market price of straw at that time.

Question by plaintiff. Do you know the usage of the trade with respect to the delivery of barley?

(Defendants objected to the question and proposed testimony on the ground that it is incompetent to vary the terms of a contract by a usage; also, that it was irrelevant; also, on the ground that it was incompetent to prove the usage at San Francisco, because it is not broad enough in territory, and some of the purchases were for outside of the city; also, because the usage was not set up in the pleading. The objections were overruled, and defendants then and there excepted.)

Witness answered: The custom is to deliver grain in the sack, of course, in this State; it always has been the custom in this State; I never knew it to be delivered in any other way, unless by special agreement. The custom of the trade is to deliver in sacks altogether. The sacks generally used are burlap, made out of jute, made in England and Scotland. Gunny sacks are made of other. Formerly used cotton and gunnies; I do not know of any other used here. Sizes of sacks run from 44 inches by 33 up to 56 by 40; that many inches of cloth in the sacks, hold: 44 by 33, near 100 pounds—not quite; the others, 160 to 180; this is the largest size; the less, 100 pounds, or a little less; intermediate sizes hold 112 to 115 pounds; others range from 100. Each firm selects his own sacks. Sack is weighed with the grain; grain is sold by weight. In January, 1868, sacks of 100 to 112 were worth about
17 cents; sacks weigh about 12 ounces *to* a pound. According
27 to usage, if nothing is said about sacks it is always expected that it will be delivered in sacks. The sack would cost about 17 cents, and the sack would bring about ¾ of a cent; would lose about 16¼ cents. Sacks are sold to parties using them for sacking grain; don't know that they are used for any other purpose than sacking grain. There have been a few experiments at shipping wheat in bulk, but they are exceptional—an elevator at Vallejo. The matter of feasibility of shipping in bulk is discussed in the newspapers. The vessels plying around the bay are not constructed for carrying in bulk. I see one insurance company advertises to take risks on grain shipped in bulk. I sell flour, all kinds of grain, all kinds of produce—principally grain and flour. We do a commission business. Sell potatoes by weight; are sold in sacks; we do not deal in bushels. I do not see potatoes

delivered in wagons. The consumer keeps the sacks; he pays for the sack and keeps it. Beans and flour are sold in sacks. Never knew grain sacks go to 50 or 70 cents; knew them to go to 35 cents. If you purchased a million pounds of barley you would be obliged to throw in the sacks at 35 cents for ¾ of a cent. The contract is frequently a blank, till filled up for sale of so many pounds barley. I should not consider an advertisement for the purchase of barley, specifying that it was to be in sacks, an extraordinary advertisement. Whenever the words "in sacks" *is* omitted, I should think it would be delivered in sacks. I have often bid on such advertisements; do not think I have often seen "in sacks" specified in the advertisement. I presume, in Halifax they have places where they stow in bins; in such cases I do not know as it would be any advantage to purchasers to have it in sacks. I have never seen it delivered in any other way than in
28 sacks. Do not think I ever saw any shipped in bulk; only a few experiments of shipping in bulk. In market, grain always includes sacks; grain is sacked by the producer, and after that all charges are in sacks. I think one ship was laden in bulk at Vallejo. Do not think the elevator at Vallejo is ever used as an elevator; it is used as a warehouse, I think.

The foregoing was all the testimony, and Mr. Clayton was the only witness produced to show the custom or usage referred to.

Upon the foregoing testimony, the court found a custom or usage to deliver barley in sacks, sufficient to make it obligatory upon the defendants, F. W. Robinson and E. N. Robinson, to deliver the barley agreed to be delivered under the contract, only in sacks; and that a delivery of 30,000 pounds of barley, in bulk, in response to a requisition for 30,000 pounds of barley made in January, 1868, was not in compliance with the contract; to all of which the defendants then and there excepted.

Defendants contended that there was not sufficient evidence of any custom or usage to incorporate into the contract of the parties set forth in the complaint a provision that the barley therein referred to should be delivered in sacks; but the court held to the contrary that the evidence was sufficient, in all respects, and found such custom or usage, and that such provision was a part of said contract; to all which defendants then and there excepted.

Defendants also contended that the question propounded to the witness, Clayton, "Do you know the usage of the trade with respect to the delivery of barley?" was incompetent and irrelevant; that it was incompetent by any answer in response to such question to vary the terms of the contract; that it was incompetent to prove the usage
29 at San Francisco, because it was not broad enough in territory, and some of the purchases were for outside of the city; also because the usage was not set up in the pleadings. But the court held to the contrary, and overruled all the objections and admitted the question to be answered, and, upon said answer, found such custom or usage; to all of which defendants then and there excepted.

And the said defendants, by their counsel, did, then and there, propose their aforesaid exceptions to the circuit judge of said circuit court, and require him to allow this bill of exceptions, which is done.

Signed and sealed at San Francisco, this 22d day of July, A. D. 1870.

(Signed) LORENZO SAWYER, [SEAL.]

Circuit Judge of the United States Circuit Court, Ninth Circuit, District of California.

(Endorsed:)
I agree that the foregoing bill of exceptions is correct.
July 22d, 1870.

L. D. LATIMER,
U. S. Attorney.

(Endorsed:) Filed 18th July, 1870. L. S. B. Sawyer, clerk.

30 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the United States greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington, in the District of Columbia, on the first Monday of December, A. D. 1870, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, of the ninth circuit, in and for the district of California, wherein F. W. Robinson, E. N. Robinson, L. L. Robinson, and S. F. Butterworth are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the U. S. circuit court (ninth circuit) for the district of California, this 20th day of September, A. D. 1870, and of the independence of the United States the ninety-fifth.

(Signed) LORENZO SAWYER,
Circuit Judge U. S. 9th Circuit.

(Endorsed:)
I admit that a copy of the within citation has been lodged in the clerk's office for me, and that I have received the same, this September 20th, 1870, for the United States.

(Signed) L. D. LATIMER,
U. S. District Attorney.

Filed September 20th, 1870. L. S. B. Sawyer, clerk, by J. F. O'Beirne, D. C.

31 *Assignment of errors.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES *vs.* F. W. ROBINSON ET AL. } Assignment of errors.

And now come the defendants in the above-entitled cause and allege that there is manifest error in the findings and judgment in said cause, and in view of the writ of error from said court to the Supreme Court of the United States, and as an assignment of errors to be considered in said Supreme Court of the United States, they point out the following:

1st. Insufficiency of the findings of fact to justify the judgment and

decision, and that the conclusions of law from the findings of fact and judgment should have been for defendants.

2nd. Insufficiency of the facts found, taken in connection with the pleadings, to justify the judgment and decision; in this, that there was nothing to show that defendants, or either of them, ever contracted or agreed to deliver any barley in sacks.

3rd. Insufficiency of the evidence in respect to custom or usage, as contained in the bill of exceptions, to justify the finding of any custom or usage to incorporate into the contract of the parties a provision that the barley therein referred to should be delivered in sacks.

4th. Insufficiency of the findings of fact to justify the conclusions
32 of law and judgment; in this, that there was nothing, or not sufficient, to show any breach of the bond sued on.

5th. Insufficiency of the findings of fact to justify the conclusions of law and judgment; in this, that there was nothing, or not sufficient, to show any damage to plaintiff.

6th. Insufficiency of the evidence as contained and set forth in the bill of exceptions to prove any custom or usage.

7th. Insufficiency of the facts found to show any custom or usage to deliver barley in sacks sufficiently invariable or certain or general or of sufficiently long standing to bind defendants, or to show that *that* defendants, or either of them, knew of it.

8th. Insufficiency of the facts found to justify the judgment; in this, that plaintiff waived the refusal of defendants to deliver 30,000 pounds of barley, as required in January, 1868, in sacks or otherwise than as tendered in bulk, and made no further requisitions; also, that no breach was shown subsequent to said tender of 30,000 pounds in January, 1868.

9th. Insufficiency of the findings of fact to justify the conclusions of law and judgment; in this, that there was nothing to show any failure or deficiency in either quality or quantity of barley tendered, and in no other case was the plaintiff authorized to purchase barley in open market, or charge defendants, or any of them, with any difference in cost.

10th. Errors in law occurring at the trial, and excepted to by defendants.

11th. Error in law in overruling defendants' objection to proof of market price of barley, at times purchases made, as set forth in the bill of exceptions.

12. Error in law in allowing question, "Do you know the usage of the trade with respect to the delivery of barley?" to be put to the witness, Clayton, and to be answered by him, as set forth in the bill
33 of exceptions.

JOHN B. FELTON,
THEODORE H. HITTELL,
Attorneys for Defendants.

(Endorsed:) Filed this 20th day of September, 1870. L. S. B. Sawyer, clerk.

34 *Bond.*

Know all men by these presents that we, L. L. Robinson, as principal, and F. L. A. Pioche and *John B. Felton* [Egbert Judson,] as sureties, of the city and county of San Francisco, State of California, are held and firmly bound unto the United States of America in the sum of eight thousand dollars, in gold coin, to be paid unto the said United States of

America, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated at said city and county of San Francisco, this twentieth day of September, A. D. 1870.

Whereas the above-named L. L. Robinson and others have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the certain suit of the said United States against him, the said L. L. Robinson and F. W. Robinson, E. N. Robinson, and S. F. Butterworth, in the circuit court of the United States in and for the district of California:

Now, therefore, the condition of this obligation is such, that if the above-named L. L. Robinson, F. W. Robinson, E. N. Robinson, and S. F. Butterworth, shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

L. L. ROBINSON. [SEAL.]
F. L. A. PIOCHE. [SEAL.]
(Erased) JOHN B. FELTON, [SEAL.]
EGBERT JUDSON. [SEAL.]

Sealed and delivered in presence of—
W. H. CHEVERS.

DISTRICT OF CALIFORNIA, *ss:*

F. L. A. Pioche and Egbert Judson, the persons named in and who executed the foregoing bond, being duly severally sworn, depose
35 and say, each for himself, that he is a freeholder in said district, and is worth the sum of eight thousand dollars, in gold coin, exclusive of property exempt from execution, and over and above all debts and liabilities.

F. L. A. PIOCHE.
(Erased) JOHN B. FELTON.
EGBERT JUDSON.

Subscribed and sworn to before me this twentieth day of September, A. D. 1870.

(NOTARIAL SEAL.) W. H. CHEVERS,
Notary Public.

I consent to the change of Egbert Judson as surety with me on the above bond instead of John B. Felton, who is attorney of the court, and not competent as a surety under rule of court.

Sept. 20, 1870.
(S'g'd) F. L. A. PIOCHE.

(Endorsed:)
We approve of the form of the within bond and the sufficiency of the sureties thereon this September 20, 1870.

LORENZO SAWYER,
Circuit Judge.

Filed September 20, 1870. L. S. B. Sawyer, clerk. By J. F. O'Beirne, D. C.

36 UNITED STATES OF AMERICA,
Ninth Circuit, District of California, ss:

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth circuit, in and for the district of California, do hereby certify that the foregoing thirty-five written pages, numbered from 1 to 35, both inclusive, are a true transcript of the record and all proceedings in the cause therein entitled, and that the same together constitute the return of the writ of error hereto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at San Francisco, this 26th day of September, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fifth.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Indorsement on cover:) No. 343. F. W. Robinson, E. N. Robinson, L. L. Robinson, & S. F. Butterworth, plaintiffs in error, vs. The United States. California C. C. U. S. Filed 6th December, 1870.

IN THE

SUPREME COURT

OF THE UNITED STATES.

DECEMBER TERM, 1871.---No. 343.

F. W. Robinson,
G. N. Robinson,
L. L. Robinson and
S. F. Butterworth,

Plaintiffs in Error,

vs.

United States,

Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

EDMOND L. GOULD,
COUNSEL.

SAN FRANCISCO:
FRANCIS & VALENTINE, STEAM PRINTERS AND ENGRAVERS.
1872.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

F. W. ROBINSON,
E. N. ROBINSON,
L. L. ROBINSON AND
S. F. BUTTERWORTH,
PLAINTIFFS IN ERROR. } No. 343.

VS.

UNITED STATES,
DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

The defendant in error demands damages for an alleged breach of contract.

The contract will be more easily understood by being copied than by being described:

"This agreement made this eighth day of June, A. D. one thousand eight hundred and sixty-seven,

between Brevet Major James T. Hoyt, Captain and Assistant Quartermaster, in the service of the United States of America, of the one part, and F. W. Robinson and E. N. Robinson, composing the firm of F. W. Robinson & Co., of the city and county of San Francisco, and State of California, of the other part.

Witnesseth, that the said Brevet Major James T. Hoyt, Assistant Quartermaster, for and in behalf of the United States of America, and the said F. W. Robinson and E. N. Robinson, composing the firm of F. W. Robinson & Co., for themselves, their heirs, executors and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other in manner following, viz:

First—That the said F. W. Robinson & Co., shall, at the places hereinafter named, deliver one million (1,000,000) pounds of first quality clean barley, and five hundred thousand (500,000) pounds of clean straw of good quality. The above mentioned supplies of barley and straw to be delivered between the first day of July A. D. 1867, and the thirtieth day of June, A. D. 1868, on the order of the said Brevet Major James T. Hoyt, Assistant Quartermaster as aforesaid, or his successor, at such times and in such quantities as may be required for the use of the troops, and to be delivered at the following posts, viz: Fort Point, Presi-

dio, Point San Jose, Camp Reynolds, Alcatraz Island and San Francisco City. The precise points at each of the above posts where the same shall be delivered shall be designated by the Acting Assistant Quartermasters of the respective posts. The portion of the same deliverable in the city of San Francisco, shall be delivered at such places in said city, as the said Brevet Major James T. Hoyt, Assistant Quartermaster, or his successor, may direct.

Second—The said Brevet Major James T. Hoyt, Assistant Quartermaster, or his successor, shall direct and determine from time to time, within the period aforesaid, what proportion of the said supplies of barley and straw shall be delivered at each of said posts and places.

Third—The United States reserves the right to accept such less quantity of the before mentioned supplies, or either of them, or require such greater quantity of each, than the amount hereinbefore specified, as may be required for consumption at the said posts during said period, all the supplies subject to inspection at the place of delivery.

Fourth—The said F. W. Robinson & Co. shall receive ninety-five one hundredths cents (95-100 cents) per pound for each and every pound of barley; seven dollars ($7) per ton for each and every ton of straw delivered and accepted under this contract at the posts and places hereinbefore stated,

in gold coin of the United States, or its equivalent in the legal currency of the Goverment of the United States of America, on the day of payment, payments to be made in San Francisco at the end of each month, for any part of the above mentioned supply of barley and straw delivered during the month, on the order of the said Brevet Major James T. Hoyt, Assistant Quartermaster, or his successor, and certified to by the Acting Assistant Quartermaster receiving the same, should the Quartermaster's Department be in funds, if not, then as soon as funds may be received for that purpose.

Fifth—That whenever and as often as the barley and straw specified to be delivered under this contract, or any part thereof, shall, in the opinion of the commanding officer at the place of delivery, be unfit for issue, or of a quality inferior to that required by this contract, a survey shall be held by two officers, to be designated by the commanding officer, and in case of disagreement, a third person shall be chosen by these two officers, the three thus appointed and chosen shall have power to reject such parts, or the whole of said barley and straw, as appears unfit for issue, or of a quality unfit for that contracted for.

Sixth—That in case of failure, or deficiency in the quality or quantity, of the barley and straw herein contracted to be delivered, then the said Brevet Major James T. Hoyt, Assistant Quarter-

master, or his successor, shall have the power to supply the deficiency by purchase in open market, and the said F. W. Robinson & Co. shall be required to pay the difference in cost, if any, in gold coin of the United States, or its equivalent in the legal currency of the Government of the United States.

Seventh—No member of Congress, officer or agent of the Government, or person employed in the public service shall be admitted to any interest, share or part in, or to any benefit to arise from, this contract.

Eighth—It is expressly provided that this contract may be terminated at such time as the Quartermaster General may direct, and is made subject to the approval of the Division and Department Commanders.

In witness whereof, the undersigned have hereunto placed their hands and seals, the day and year first above written.

{5 Cent Int Rev. Stamp canceled.}

F. W. ROBINSON, [SEAL.]
E. N. ROBINSON. [SEAL.]

Witness:

JAS. T. HOYT,

D. S. WIGGINS, Capt. and A. Q. M. and B. Maj.

The answer was a general denial; the case was tried without a jury; the Court found for the plaintiff, assessing the damages at the sum of four thou-

sand and forty-eight dollars and sixteen cents in gold coin.

The controlling question, presented by the record, is one of custom. The United States required the 1,000,000 pounds of barley to be delivered in sacks. The demand was refused, and a tender was made in bulk. This refusal constitutes the alleged cause of action.

To establish the breach alleged, testimony was offered tending to show a custom of delivering barley in sacks. The offer was duly excepted to, and was overruled. (Rec. p. 13.)

The witness then testified:

Question—"Do you know the usage of trade, with respect to the delivery of barley?"

(Defendants objected to the question and proposed testimony on the ground that it is incompetent to vary the terms of a contract by a usage; also, that it was irrelevant; also, on the ground that it was incompetent to prove the usage at San Francisco, because it is not broad enough in territory, and some of the purchases were for outside of the city; also, because the usage was not set up in the pleading. The objections were overruled, and defendants then and there excepted.)

Witness answered: The custom is to deliver grain in the sack, of course, in this State; it always has been the custom in this State; I never knew it to delivered in any other way, unless by

special agreement. The custom of the trade is to deliver in sacks altogether. The sacks generally used are burlap, made out of jute, made in England and Scotland. Gunny sacks are made of other. Formerly used cotton and gunnies; I do not know of any other used here. Sizes of sacks run from 44 inches by 33, up to 56 by 40; that many inches of cloth in the sacks, hold: 44 by 33, near 100 pounds—not quite; the others, 160 to 180; this is the largest size; the less, 100 pounds, or a little less; intermediate sizes hold 112 to 115 pounds; others range from 100. Each firm selects his own sacks. Sack is weighed with the grain; grain is sold by weight. In January, 1868, sacks of 100 to 112 were about 17 cents; sacks weigh about 12 ounces *to* a pound. According to usage, if nothing is said about sacks it is always expected that it will be delivered in sacks. The sack would cost about 17 cents, and the sack would bring about ¾ of a cent; would lose about 16¼ cents. Sacks are sold to parties using them for sacking grain; don't know that they are used for any other purpose than sacking grain. There have been a few experiments at shipping wheat in bulk, but they are exceptional—an elevator at Vallejo. The matter of feasibility of shipping in bulk is discussed in the newspapers. The vessels plying around the bay are not constructed for carrying in bulk. I see one insurance company

advertises to take risks on grain shipped in bulk. I sell flour, all kinds of grain, all kinds of produce —principally grain and flour. We do a commission business. Sell potatoes by weight; are sold in sacks; we do not deal in bushels. I do not see potatoes delivered in wagons. The consumer keeps the sacks; he pays for the sack and keeps it. Beans and flour are sold in sacks. Never knew grain sacks go to 50 to 70 cents; knew them to go to 35 cents. If you purchased a million pounds of barley you would be obliged to throw in the sacks at 35 cents for ¾ of a cent. The contract is frequently a blank, till filled up for sale of so many pounds barley. I should not consider an advertisement for the purchase of barley, specifying that it was to be in sacks, an extraordinary advertisement. Whenever the words "in sacks" *is* omitted, I should think it would be delivered in sacks. I have often bid on such advertisements; do not think I have otten seen "in sacks" specified in the advertisement. I presume, in Halifax they have places where they stow in bins; in such cases I do not know as it would be any advantage to purchasers to have it in sacks. I have never seen it delivered in any other way than in sacks. Do not think I ever saw any shipped in bulk; only a few experiments of shipping in bulk. In market, grain always includes sacks; grain is sacked by the producer, and after that all charges

are in sacks. I think one ship was laden in bulk at Vallejo. Do not think the elevator at Vallejo is ever used as an elevator; it is used as a warehouse, I think.

This was the only testimony touching the alleged custom.

POINT I.

The testimony did not establish the existence of a custom of a character, certain, uniform, public, fixed, reasonable and notorious, so as to justify a presumption of the knowledge of its existence by the party sought to be charged.

A distinction is to be made between custom and usage. There may be a usage without a custom, but there can be no custom without a usage, for custom is the result of usage. To establish a custom, there must have existed a uniform, long established, widely, universally and notoriously known and recognized commercial habit to transact business in a certain way, in order that this habit may be considered an incident to a mercantile contract without being mentioned, and so, become one of its elements.

Edie *v.* East India Company, 2 Burrows, 1216:

The question was as to the character of the endorsement of a foreign bill of exchange. At the trial, Lord Mansfield admitted evidence of the

usage of merchants, but, upon reflection thought the evidence inadmissable. His language, however, concerning the evidence to establish a usage, is no less valuable.

"I told the jury that by the general law (leaving "the usage out of the case), the endorsement "would follow the nature of the original bill, etc.

"And after having told them that this was the "general law, I left it to them upon the particular "evidence of the USAGE that had been laid before "them, and recommended it to them to consider "well of this evidence, and told them that if they "found a USAGE so established and settled among "merchants and traders, as to be clear and plain, "beyond doubt, they might find a verdict for de-"fendant, etc.

"But I directed them, that if they were doubtful "of the usage, or if the usage appeared to them "not to be fully and clearly established, or to be "the other way, then they ought to find for the "plaintiffs."

Mr. Justice Wilmot, p. 1228:

"There may, indeed, be some questions depend-"ing upon customs among merchants, where if "there be a doubt about the custom it may be fit "and proper to take the opinions of merchants "therefor, yet that is only where the law remains "doubtful; and even then, the custom must be "proved by *facts*, not by OPINION only.

"A well established custom on any subject is a "part of the law of the contract, with a knowl- "edge of which the parties stipulate. But a cus- "tom to be binding as a part of the *lex contractum* "must be general and well understood."

Smeltz *v.* Kennedy, Riley, 38.

Where a custom is found to be general and notorious, and to have the other requisites of a valid custom, it is a conclusion of law that the parties must have contracted in reference to it.

Note Q—2 Parsons on Contracts, 544.

In Cope *v.* Dodd, 13 Penn. State Rep. 37, the Court said :

"A usage which is to govern a question of right, "should be so certain, uniform and notorious as "probably to be known to, and understood by, the "parties, as entering into their contract."

This Court has enforced the same idea of notoriety on two occasions.

"A usage, such as is pleaded in this suit, if exist- "ing, must be notorious and certain, and have been "uniform in its application, and long established in "practice."

Garrison *v.* Memphis Insurance Co., 19 How, 317.

"But these usages had been of long standing "and general notoriety."

Adams *v.* Otterback, 15 How. 545.

In U. S. *v.* Buchanan, 8 How. 102, this Court adopted a definition of a custom, in the following words:

"There is a very good description of a custom "or usage in Ch. 1, Art. 3, of the Civil Code of "Louisiana:—Customs result from a long series of "actions, constantly repeated, which have, by such "frequent repetition and by uninterrupted acquies- "cence, acquired the force of a tacit and common "consent."

In Coxe *v.* Heisley, 19 Penn. State Rep. 246, a custom was defined as follows:

"It was held, a century since, that all customs "which intrench on the common law, ought to be "taken strictly, nay, very strictly (11 Mad. 160), "and that where law and custom conflict, the for- "mer must stand, and the latter go down (7 Vin. "Abr. 187). The leaning of the Courts both in "England and America, has of late years become "still stronger against allowing the law to be con- "trolled by local usages (2 Sumner 567). The "evidence of them often arises out of mere mis- "take, and they are so constantly liable to misap- "prehension and abuse, that they must always be "received with dislike and jealousy. For these "reasons it is necessary that a party who relies on "such a custom, shall prove distinctly, not only "that it exists, but that it has all the legal requis- "ites of an established custom.

"It must be *ancient*. In England it must have "stood time out of mind. In this state it must "have existed at least long enough to become gen- "erally known (3 W. C. C. R. 149; 3 Watts 179). "Neither of the three witnesses sworn for the "defendant testify whether the custom he relied "on was a month, or a year, or ten years old, at the "time of the trial. This is a fatal defect in the "proof. Antiquity is not enough. To be valid, a "custom ought to be proved to have been uniform "from its commencement, without interruption or "serious opposition, and to have had the acquies- "cence of those who are interested against it, as "well as of that class who are benefited by it. It "is not sufficient that transporters and boatmen "have been in the habit of denying the legal lia- "bility of common carriers on the canal. Exemp- "tion from the public and general laws of the "country cannot be made out in favor of any por- "tion of the people by such means. Another most "essential requisite is that it be *notorious*, so that "all men whose interests or rights are brought "within its operation, may know of it."

Walker *v.* Barron, 6 Min. 513:

"The question propounded to the witness in this "case had no reference to the time when the con- "tract was alleged to have been made, which was "several years before; nor to the place where it "was made. It did not even refer to the county

"or State. It did not call for an established, uni-
"form custom that had become the law of the bus-
"iness referred to. It was therefore irrelevant,
"and properly ruled out."

In U. S. *v* Duval, Gilpin, 372, Judge Hopkinson charged the jury with reference to a usage:

"You will understand that a usage which is to
"govern a question of right, between parties in
"this Court, must be so certain, uniform and noto-
"rious, that you may say it was understood and
"known to the parties."

"But when the usage or custom is resorted to,
"for the purpose of controlling the general prin-
"ciples and obligations of the law of contract,
"there is no doubt of the necessity of showing its
"notoriety as well as its reasonableness and
"justice.

"The latter qualities are generally supposed to
"be sufficiently shown by the general acquiescence
"of the public in the usage."

Redfield on Railways, Vol. 2, p. 121.

Mr. Greenleaf says: "Both custom and usage
"must be *proved by evidence of facts*—not of mere
"speculative opinions—and by witnesses who have
"had frequent and actual experience of the cus-
"tom or usage, and do not speak from report
"alone."

Vol. 2, Sec. 252.

Price et al. *v.* White, 9 Ala. 516.

"The proof is further in fault in not stating "whether the usage was uniform, or how long it "had existed."

In Cunningham *v.* Fonblanque, 6 Carr, and Payne 44, Park, J., stated to the jury:

"The question for you will be whether the usage "is, in point of fact, proved. There is a special "contract specially stated in the declaration, and "the plaintiff must, to support his declaration, "prove the usage exactly as he has laid it. This "he has not done. In the declaration it is stated "that the notice is to be given by the printer or "proprietor as the case may be. Now, there is not "a single witness who has proved the reciprocity of "the practice, that is, by instances. Two witnesses "stated it, but did not produce any instances."

In Huston et als. *v.* Peters, 1 Met. Ky. 562, it was said:

"To make such a custom admissable, it must be "of such age, such uniformity of observance, such "certainty and fixedness of character, and of such "general notoriety, that a jury would feel clear in "saying that it was known to the party to be "affected by it, etc."

"Usage," says C. J. Parker, in 9 Pick. 430, "is "a thing which must be public and notorious."

Judge Duer says, 1 Duer on Insurance, p. 182-3:

"When the inquiry relates to the proper appli-
"cation of a doubtful word, the distinction be-
"tween an interpretation settled by usage, and
"one resting *only* on opinions, is certain not to be
"known or understood by the witnesses and jurors,
"and is too often forgotten, or not enforced by the
"judge. Hence, the first answers of the witnesses
"will naturally express no more than their own
"understanding and belief, and when they fail to
"show by facts, that there is an existing practice,
"corresponding with their belief, their testimony
"amounts to no more than the declaration of an
"opinion, which, whatever may be the number of
"those, who concur in expressing it, should be
"wholly withdrawn from the consideration of the
"jury. The existence of a usage, whatever may
"be the nature of the subject to which it relates,
"is, in all cases, a fact: a complex fact, it is true,
"resulting from a variety and succession of indi-
"vidual acts, but still a fact, to be proved like all
"other facts, by the testimony of witnesses speak-
"ing from their personal knowledge. It is not
"created by hypothetical opinions, but by actual
"practice, and can only be established by a series
"of *acts* of similar character and import, performed
"at different times, by different persons. It is to
"these acts, that the testimony, properly restrained
"and directed, should be strictly confined, and it

"is upon their number, uniformity and notoriety,
"that the weight and value of the evidence solely
"depend. Hence, where a witness swears, gen-
"erally, that a particular usage exists, yet is
"unable to state from his own knowledge any in-
"stances of its actual observance, his testimony
"should at once, be rejected; and it is only by a
"strict adherence to this rule, that the important
"distinction between the evidence of opinions and
"belief, and that of facts, is possible to be main-
"tained. To illustrate these remaks—Let us
"suppose the inquiry to be whether the word
"'skins,' which is one of the articles exempt from
"average under the common memorandum of the
"policy, has acquired by the usage of trade a dis-
"tinctive meaning, restricting it to those skins that
"are valuable, not for the fur, but solely to be
"dressed as leather. A number of merchants,
"importers of skins, are examined as witnesses,
"and all concur in saying that this restricted
"meaning in their understanding, and the believe,
"in that of all the trade, is the proper and usual
"import of the word. The testimony is imposing,
"and at first seems conclusive, yet, if unsupported
"by specific facts, would, in truth, be valueless.
"But should the witness proceed to say, that not
"only was such their understanding of the mean-
"ing of the meaning of the word, but that for a
"long time anterior to the insurance, in bills of

"lading, invoices, contracts of sale, and other mer-
"cantile instruments, it had been used, and was
"practically interpreted by the parties interested,
"in this restricted sense, and in no other, the
"proof of a usage, supposing the testimony to be
"uniform and uncontradicted, would be complete;
"and the presumption, that the commercial mean-
"ing thus established, was meant to be adopted in
"the policy, would certainly attach. I state,
"therefore, as the general conclusion, that the
"question, whether a particular word in a policy
"has acquired by the usage of trade, a technical
"meaning, distinct from its popular sense, is always
"to be determined by the inquiry, whether such
"has been its use and practical interpretation, in
"other mercantile instruments and contracts, since
"it is only from the repetition and uniformity of
"these and similar acts, that a usage, in the
"proper sense of the term, can arise."

The witness, Clayton, mentioned no one instance of a delivery in sacks. His testimony is of a negative character, save where he gives, what seems to be, his opinion. Doubtless, he is sincere, but, to have made his statements valuable, he should have mentioned, at least, some of the instances in which he had, *personally*, known of the delivery of barley in sacks. It is not possible to say what value should be given to his statement—"I never knew it to be delivered in any other way," unless it were

known how often he had seen barley delivered. He says he "believes" his firm does its "share of the grain business." That may be, and yet he not be cognizant of the manner in which grain is *uniformly* delivered. For his share in the partnership activity, may absorb his attention in favor of the collecting, or the bookkeeping, or some other department, not favorable to an acquaintance with the ceremony of *delivering* the merchandise in which his firm is engaged.

He does not say he *knows* what the custom is. He makes no pretense of knowledge on the subject, excepting that which results from the mere fact of his discoursing about it. *Non Constat* that he ever saw a sack of barley delivered.

A custom is compounded of law and fact. Because, in commercial dealing, a given usage is shown to exist, it does not follow that a *custom* is shown to exist. The usage must be proved to have a certain, well defined character, and then it becomes a custom, in contemplation of the law. The U. S. Attorney very properly abstained from interrogating his witness with regard to a custom. He simply asked if the witness knew of the existence of a usage, obviously intending to follow up that question by one calling for a description of the usage, and then proposing to offer such usage as one having the elements of a *custom*.

But the witness immediately testified to the ex-

istence of a custom, and thus, usurped the function of the Judge.

His assertion that a "custom" exists, is not the *evidence of facts*, which, as we have seen, Mr. Greenleaf says "must be proved." The facts being established, the Court will consider the question of their value and sufficiency, and will, for itself, determine if they be sufficient to engender a custom.

Mr. Justice Story is equally emphatic in requiring proof of instances. In his work on contracts, 8, he says:

"In case a general usage is set up as modifying "a contract, it must be proved to exist by in- "stances, and cannot be supported by evidence of "opinion."

Clayton mentioned no instances. He, therefore, did not prove a custom. He said there was a custom, and, no doubt, thought so. But the existence of a custom, as we have seen, is a question of law, and, had he been required to mention the *elements* of a custom, nothing in the record shows he would have been likely to succeed. And what "frequent and actual experience," in the language of Greenleaf, did this witness ever have? So far as the record informs us, he is a man wholly without experience touching the matter in hand. He says it has "always" been the custom in this State—without being asked what the custom is, in or out of the State. He was asked merely if he knew the

usage of trade. It nowhere appears he has "always" lived in the State. He may have meant since California was a State. If so, he should have disclosed the date of his commencing business in it.

There is no conflict of authority touching the characteristics of a custom which is to bind a party contracting. Its antiquity and uniformity must be shown; its universality, and certainty shown; its *notoriety* shown. All these features of the custom alleged, must be affirmatively established. The defendant is not called on to prove that the custom is wanting in these features. That they belong to the custom, and are part and parcel of its character, is a fact, vital to the plaintiff's case. If they be not proved, the Court will conclude they have no existence.

When a witness states that a given custom exists, the law raises no presumption that the custom is distinguished by all the attributes necessary to elevate it to the dignity of a contract—that it is such a custom as is good, valid and binding. If that were not so, the defendant would be bound by a cross-examination to develope the absence of such features as are required, by law, to create a custom valid and binding in law. But a witness who deposes: "It is the custom in this State;" "it "always has been the custom in this State;" "I "never knew it to be done in any other way;" "the custom is to do it in that way altogether;"

is a witness who needs no cross-examination, for he has shown no *facts* creating a usage, out of which a custom can arise;" "*no frequent and actual experience of the custom or usage relied on;*" no universality, certainty, uniformity or notoriety belonging to what, he thinks, is a custom, and which is required, by law, to create one.

POINT II.

The testimony as to usage was inadmissable for want of an averment in the pleadings.

It will be seen that the testimony of Clayton was objected to, "because the usage was not set up "in the pleadings, and that a bill of exceptions to "the ruling of the Court was duly taken." Rec. p. 14.

By the Practice Act of California, a complaint must contain "a statement of the facts constituting "the cause of action in an ordinary and concise "language." Sec. 30. This provision is copied substantially from the N. Y. Code. "A plain and "concise statement of the facts constituting a cause "of action, without unnecessary repetition." Sec. 142.

The *fact* of the existence of a usage was indispensable to a recovery. It is expressly declared to be so upon the record, by the defendant who drew the bill of exceptions; by the Judge who signed, and by the District Attorney who approved, it.

"It became necessary for the plaintiff to sustain "the issues in its part, to prove a custom or usage "to deliver barley in sacks, sufficient to make it "obligatory in the defendants * *, to deliver "the barley agreed to be delivered by them under "the contract set forth in the complaint only in "sacks." Rec. pp. 12, 13.

"I agree that the foregoing bill of exceptions is correct. (Signed.) L. D. LATIMER,
U. S. Attorney."

Rec. p. 15.

The *fact* then, being necessary to a recovery, an omission of its averment is fatal.

"A complaint must, in all cases, be so framed "and expressed as to convey to the mind of the "defendant full information of the facts which are "relied on as the ground of the action, and in "judging of its meaning the words used are to be "understood in their ordinary and popular sense. "It is this that the code evidently means in re- "quiring that the complaint shall be "*a plain and* "*concise statement of the facts constituting the cause* "*of action.*' A plain statement is one that may "be readily understood, not merely by lawyers, "but by all who are sufficiently acquainted with "the language in which it is written."

Mann *v.* Morewood, 5 Sandf., 564.

This Court held, in Bank U. S. *v.* Smith, 11 Wheaton, 161:

"It is a general rule in pleading, that, when "any fact is necessary to be proved on the trial in "order to sustain the plaintiff's right of recovery, "the declaration must contain an averment sub- "stantially of such fact, in order to let in the "proof. But the declaration need not contain any "averment which it is not necessary to prove. "For the purpose, therefore, of determining whether "the declaration in the case is substantially defec- "tive for want of an express averment, that de- "mand of payment of the maker was made, etc., "etc., it is proper to inquire whether proof of that "fact was indispensably necessary to entitle the "plaintiff to recover."

In N. C. Co. *v.* Kidd, 37 Cal. 304, the Supreme Court of Cal. held "The theory of our Practice "Act, and especially of the section cited, is that a "plaintiff shall not only state the specific facts "which constitute the cause of action, but shall "state the specific relief to which he considers "himself entitled.

"The policy is to apprize the opposite party of "the precise nature of the demand, in order that "he may come prepared to meet it."

Sec. 6C of the Practice Act reads:

"A material allegation in a pleading is one

"essential to the cause or defense, and which could "not be stricken from the pleading without leaving "it insufficient."

In Green *v.* Palmer, 15 Cal. 413, it was said—Field, C. J.:

"The following question will determine in every "case whether an allegation be material. Can it "be made the subject of a material issue? In "other words, if it be denied, will the failure to "prove it, decide the case, in whole or in part? "If it will not, then the fact alleged is not "material. It is not one of those which constitute "the cause of action, defense or reply.

"And where, as in the present case, such a "usage is set up, so much in conflict with general "principles, we think the averment should be such "as to bring the case clearly within the rule. "Here there is no averment that the alleged "custom is general or uniform among merchants "of the class at Indianapolis, or that it had existed "for any considerable period of time; for aught "that appears, it may not have been in existence "at the date of the shipment by the plaintiff."

Wallace *v.* Morgan, 23 Indiana, 403.

The necessity of an averment of the existence of a usage which a party intends to rely upon, may be said to be substantially settled in this Court.

In Reimer *v.* Bank of Columbia, 9 Wheaton, 594, it was held:

"The want of an averment so as to let in the proof of usage cannot now be objected to the record. The evidence was admitted *without objection*, and, now, forms a part of the record as contained in the bill of exceptions.

"Had an objection been made to the admission "of the evidence of usage for want of a proper "averment in the declaration, and the evidence "had, notwithstanding, been received, it would "have presented a very different question."

Simpleman *v.* Biddle, 1 Harrington, 522. The Court said:

"A general custom may be proved without being "pleaded; or, perhaps, it would be judicially "noticed without being pleaded. But a custom, "obtaining only in a particular district or neigh-"borhood, must be pleaded."

POINT III.

The testimony of one witness is insufficient to establish a custom, or prove that any fact is notoriously known.

Lee *v.* Merrick, 8 Wisconsin, 234:

The demand was for services in brick-making, and reliance was placed upon a custom of brick-makers, to work during the entire brick-making season.

The Court said:

"There was an attempt on the part of defendants "to show that it was a custom that foremen and "hands who hired to work in a brickyard, were "hired for the brick-making season. But we "regard the testimony on this point as altogether "too vague and uncertain to show an established "custom as to the time of service—a custom "entering into the contract, and which the parties "had in view when they made the contract. The "whole evidence goes strongly to prove a hiring by "the month, at a given ratio. Two witnesses only, "testified that it was the usage or practice that "all hands hired on brick-yards, are hired for the "the season of brick-making. This appears insuf- "ficient to show an ancient, universal and perfectly "established custom, entering into and determin- "ing the contract of employment between these "parties."

Halwerson *v.* Cole, 1 Speers, 321, was a case i which full freight was charged on goods which, having been damaged on the voyage, were sold at a port, short of the port of destination.

"The general rule is admitted to be as stated, "but it is supposed that the usage of trade in "Charleston has established a different rule.

"If a particular custom be well established and "understood, it becomes a part of the law, and

"contracts made at the place where such custom "prevails are construed in reference to the custom. "But such custom must be clearly established, and "I do not think the evidence of a single individ- "ual is enough to establish a usage of trade for "Charleston, different from the general rule which "governs at all other places, both in England and "America."

In Wood *v.* Hickok, 2 Wendell, 501, it appeared that the plaintiffs, having sold goods to the defendant, rendered an account in which interest was charged on such items as had run over ninety days, and the plaintiff, to support the charge, relied on a custom which was proved by one witness who stated it to be "the uniform custom to charge "interest on goods sold after ninety days, unless a "special agreement with the purchaser is made to "the contrary, etc." But the Supreme Court of "New York rejected this testimony as insufficient "to establish a custom, holding the following lan- "guage, p. 504.

The Court held:

"The testimony of one of the witnesses that it "is the uniform practice of grocers to charge inter "est on goods sold, after ninety days, unless" "special agreement to the contrary is made, does "not amount to proof of the usage of a particular "trade of which all dealers in that line are bound

"to take notice and are presumed to be informed."

Bissell *v.* Ryan, 23 Ill. 569 :

A physician was called to prove a usage among medical men to charge the head of a family for services rendered to any persons who may compose it. The Court said :

"Nor can the usage of any class of men be "established by the testimony of a single witness."

In Watts *v.* Lindsay's heirs, 7 Wheaton, 162, it was held by this Court that one witness could not establish the fact of notoriety. It was a question of the identity of a stream.

"The words 'Head Creek,' emphatically apply "to that order; nor would they depart from it, "unless another stream by general *reputation* or "*notoriety* had been so considered.

"It has, however, never been held that *reputa-* "*tion* or *notoriety* could be established by a single "witness."

NOTE.—In none of the authorities, on this point, is there a reason given. The point is, therefore, suggested—rather than asserted as a principle well founded in law.

POINT IV.

Usages, adding new incidents to contracts should be sparingly adopted. They are not regarded with favor by Courts of Justice.

Upon this point, the authorities are not numerous, but they are of a decided and emphatic character. The well-known language of Mr. Justice Story is, perhaps, the strongest assertion of this principle:

"I own, myself, to be no friend to the indis-
"criminate admission of evidence of supposed
"usages and customs in a particular trade or
"business, and of the understanding of witnesses
"relative thereto, which has been, in former times,
"so frequently resorted to, but which is now sub-
"jected by our Courts to more exact and well
"defined restrictions.

"Such evidence is often, very often, of a loose
"and indeterminate nature, founded upon very
"imperfect notions of the subject; and, therefore,
"it should, as I think, be admitted with a cautious
"reluctance and scrupulous jealousy, as it may
"shift the whole grounds of the ordinary interpre-
"tation of policies of insurance and other
"contracts."

Rogers *v.* Mechanics' Ins. Co., 1 Story, 608.

The same judge said.

"As to the usage in this State, there is no evi-
"dence before the Court: and the statements at the

"bar are of opposite characters, leading to the "conclusion, that there is no uniform and well "established usage in our mercantile community; "and, if there were, I am among those judges who "think usages among merchants should be very "sparingly adopted as rules of law, by Courts of "justice, as they are often founded in mere mistakes, "and still more often in the want of enlarged and "comprehensive views of the full bearing of prin-"ciples."

Donnell *v.* Columbian Ins. Co., 2 Sumner, 377.

"This question of commercial usage was consid-"ered by this Court with some care, in the case of "Dixon *v.* Dunham 14 Ill. 324. It was there held, "as it has been held everywhere else, that a usage, "to become binding upon parties, must have anti-"quity as well as uniformity and universality, "whereas the instruction supposes the custom of a "day may become binding upon parties so as it be "uniform and clearly established, whether the jury "might believe that the parties contracted in view "of it or not. Commercial interests require that "the well established rules of law, by which the "customs of a particular place become incorporated "into the contracts of parties, should not be "relaxed. They may be well admitted when they "are not inconsistent with the contract of the par-"ties; when they are reasonable, of long standing,

"uniform, clearly established, and well understood, "and not inconsistent with any rules of law. By "comparing the instruction with this test, it will "be seen at once, that it was properly refused."

Crawford et al. *v.* Clark et al. 15 Ill. 567.

"The use of parol proof has been, to say the "least, sufficiently extended by suffering it to con- "trol the private written laws which individuals "establish between themselves for the regulation "of their rights in particular transactions, without "suffering it to control the general law of the "land."

Per Gibson, C. J, in Bolton *v.* Colder, 1 Watts, 363.

"It is not denied that usage may enter into and "become a part of the law of trade, or that the "law is to be applied to the transactions of parties "contracting and doing business in view of, and in "reference to such usage, but it is not readily adopted "by courts, and the proof of such usage must be "clear and explicit, and the usage so well estab- "lished, uniform and so notorious that the parties "must be presumed to know it, and to have con- "tracted in reference to it."

Power *v.* Kane, 5 Wisconsin, 265.

"There is a strong and increasing disinclination "of the courts to allow the general laws of the

"country to be varied by proof of local usages. "Such a usage is binding, only the ground that the "party charged, contracted with reference to it. "The evidence must be such as clearly to authorize "the presumption that he had knowledge of it.

"To make such a custom admissible, it must be "of such age, such uniformity of observance, such "certainty and fixedness of character, and of such "notoriety that a jury would feel clear in saying "that it was known to the party sought to be "affected by it."

Caldwell *v.* Dawson, 4 Met. Ky. 121.

In Thompson *v.* Riggs, 5 Wall, 679, this Court quoted the language of Judge Story first above quoted, with approbation.

POINT V.

The contract being plain, clear and free from ambiguity, requires no explanation; and therefore, parol testimony is not admissible to interpret its language.

Parol evidence seems to be admissable in certain, but rare cases, to annex incidents to written contracts in matters with respect to which they are silent.

First—To explain scientific terms or local, provincial, peculiar phrases, in which case, evidence simply serves as a lexicon to give the meaning of the languages used.

Second—In those cases where the contract is not written out but is inferred from certain written acts to change or vary the inference which would be drawn from those acts. Thus, in the case of an indorsement, the indorser does not write out his contract in full, he merely signs his name on the back of the instrument In such a case it is not unreasonable that usage should be allowed to explain the obligation. But no case can be found where, in a contract like this, carefully and fully drawn, both as to what is to be delivered, how much, when and where, parol evidence is deemed admissible to show that merchandise was contracted for, other than that which the writing specifies – that another merchandise fifteen times more valuable than the article sold, was to be thrown in for one-fifteenth of its value.

There are, perhaps, cases where the wrapper of a kind of merchandise, is so insignificant in value, where it is not susceptible of being used again, where its use is but a mode and manner of delivery, such a custom might be proved. But it often happens that the merchandise is delivered in cases, wrappers or holders, which are—themselves valuable—the object of an independent commerce, and which retain their value after they have served to make the necessary delivery of the articles in question.

But those are cases in which, by the very nature

of the thing sold, a delivery in such articles becomes a necessity. Quicksilver, for example, must be delivered in flasks, but these flasks have a distinct value. Vitrol must be delivered in carboys. All liquors must be delivered in solid holders; but barley may be delivered in bulk as well as in sacks.

Indeed, the language of the contract itself would seem to exclude the idea of a delivery, other than in bulk. By Art. 2, the plaintiff was empowered to decide as to "what proportion of the said sup- "plies of barley" should be delivered; and by Art. 1, it was to be delivered at "such times, 'and "in such quantities' as might be required for the "use of the troops"

Referring to the contents of a sack, the witness said, p. 13, a sack, 44 by 33, will hold 100 pounds —not quite. Now, suppose a demand of delivery of 100 pounds to be made. The sack costs 17 cents, but it does not hold 100 pounds; must the contractor furnish another sack for the difference? Should he furnish seventeen cents worth of one merchandise, in order to deliver ten pounds of another, worth less than ten cents? From a construction leading to such an absurdity, we must recede, until reaching one in consonance with reason and fair dealing. The contract looked to a delivering of *pounds*—not *sacks* of barley.

It will be seen from the evidence of Mr. Clayton,

that if this new term can be introduced into the contract, it would make a difference of $1600 to the defendants, taking sacks at their market value at the time when defendants tendered the barley in bulk; and a difference of thirty-four hundred dollars if the sacks had reached the market value, which they sometimes reach; and this, in a contract of only nine thousand five hundred dollars, so that the defendant, by his contract for barley, at 95-100 of a cent per pound, would bind himself to furnish a wholly distinct merchandise, worth from fifteen to thirty-five cents per pound.

This contract has in it, no word of doubtful meaning. There is no attempt to show that any word or phrase has a local meaning. If the defendant be forced to supply 10,000 sacks, worth from fifteen to thirty-five cents each, he is compelled to do something which is not only not mentioned in the contract, but is repugnant to it. This contract is made to say, you shall furnish—not 1,000,000 pounds of barley, but only nine hundred and ninety thousand pounds of barley; and you shall furnish ten thousand pounds of bagging in lieu of the ten thousand pounds of barley. It not only makes him contract to deliver a merchandise his contract does not mention, but to deliver of the merchandise specified in the contract, a quantity less than he has agreed to deliver.

The rule of law is clear, that when the terms of

a contract are unambiguous, no usage can be shown to explain it.

POINT VI.

The alleged custom is void for uncertainty.

Blackstone says:

"Customs ought to be *certain.* A custom that "lands, shall descend to the most worthy of the "owner's blood, is void; for how shall their worth "be determined? But a custom to descend to the "next male of the blood is ~~custom~~ custom, and therefore, "good.

"A custom to pay two-pence an acre, in lieu of "tithes, is good; but to pay sometimes two pence, "and sometimes three pence, as the occupier of the "land pleases, is bad for uncertainty."

Vol. 1, p. 77.

In Wallace *v.* Morgan, 23 Ind. 403, a custom was declared void for uncertainty. A factor having received a consignment of flour, shipped a portion of it to another port, consigned to a commission merchant who failed. This re-shipment was justified on the ground of an alleged usage, at the place of business of the factor, to ship to New York for sale, flour not suitable to his market.

The Court said:

"But is the alleged custom certain? It is, that "'flour of a grade not suitable for the market and

"sale in the city of Indianaplis was, in the ab-
"sence of special instructions, forwarded to the
"city of New York.'

"It may well be asked, to what grade of flour
"does this alleged custom apply to render it cer-
"tain? The allegations imply that flour of some
"grade or grades is suitable to the *Indianapolis*
"market. If the custom defined that quality,
"then it might be inferred that all other grades
"were excluded, and should be shipped to *New*
"*York*. Or, if the custom defined the particular
"grades that they were not suitable to the *Indian-*
"*apolis* market, then the commission merchant, on
"the receipt of flour of the condemned grades,
"would at once know his duty. The plaintiff's
"shipment consisted of two different grades, single
"X and XXX, and yet both are condemned as
"unsuitable. The question involved concerns the
"shipper quite as much as it does the factor, and
"is important to him, in his effort to become a
"competitor in the *Indianapolis* market, to know
"what grade of flour is suitable to the tastes of
"those depending on that market for supplies, or
"that may be demanded by the particular use to
"which it may be applied. Or, if certain grades
"are to be condemned as unsuitable, and, under
"the alleged custom, sent to *New York*, to know
"what such grades are. If such a custom exist
"among the commission merchants of that place,

"and is certain and well defined, they should be "able at once, by the inspection of the brand or "quality of flour, to determine it promptly.

"The alleged custom, it seems to us, is void for "uncertainty; because, by its terms, as stated in "the pleading, it is impossible to determine what "grade of flour is, and what is not, subject to its "provisions, and condemned to be shipped to *New* "*York*. It would seem to leave each factor to "determine from his own judgment, if not his own "peculiar tastes, to what grades the custom applies. "If each day is to determine its application, making "it apply to one grade to-day and to another to-"morrow—if at one period it applies to all grades, "and at another to none—it is not wholly uncer-"tain, but is misnamed a 'commercial usage.'"

The evidence establishes the uncertainty and want of uniformity of the alleged custom; for it appears an elevator had been built at Vallejo (of course, to receive grain delivered in bulk), and what is conclusive on the subject is, that an Insurance company advertises for risks on grain shipped in bulk. This shows, at least, a want of uniformity in the usage, if there were one, for the officers of insurance companies always know the course of trade, and if it had not been known in commercial circles that grain was being delivered in bulk, no company should have incurred the expense of

"upon mutual promises, are perfected and made "binding by the bare consent of the parties, the "promise or undertaking of the one party to do one "thing being the consideration for the promise of the "other to do another. To these contracts, framed "and constituted for the performance of mutual and "reciprocal acts and duties, and founded upon a "mutuality and reciprocity of obligation and liability "the objection of *nudum pactum* cannot apply. "Such are all contracts of sale where the promise or "undertaking of the one party to sell, forms the con-"sideration for the promise of the other to buy, and "where "the bargain is struck," and the contract "concluded, by the mere assent of the parties, "neither of them being at liberty "to be off," pro-"vided possession of the subject matter of the sale "be tendered by the seller within a reasonable "period(*z*).

"*Mutual promises.*—All contracts founded upon "mutual promises between persons of full age, must "become obligatory upon both parties at the same "instant (*e*), so that each may have an action upon "it, or it will bind neither; if the one only is bound, "there is no consideration for the promise of the "other, and such promise is consequently *nudum* "*pactum*. A written agreement, consequently, to "submit disputes and differences to arbitration, must "be signed by all parties before any one can be made "liable upon it, as the obligation by all to obey the

"award of the arbitrator, is the consideration to "each for his entering into such a contract. Before "a plaintiff, therefore, can succeed in an action upon "such a contract, he must show that he had himself "engaged to be bound the award (*f*). The mutuality "of obligation is the very essence of all contracts "founded upon mutual promises. "Hence it fol- "lows," observes Pothier, "that nothing can be "more contradictory to such an obligation than an "entire liberty in either of the parties making the "promise to perform it or not, as he may please. "An agreement giving such a liberty would be abso- "lutely void for want of obligation (*g*), i. e. so long "as the contract remained executory, and nothing "had been done under it. But if the contract has "been executed by the performance of the act form- "ing the consideration for the promise, then it is no "answer to an action to say that the plaintiff was "not, by the terms of the original contract, *bound* "to do the act, and that there was consequently no "mutuality of obligation."

Mr. Addison gives only the substance of a part of Pothier's language. The whole is worthy of being quoted: See Pothier on Obligations, Nos. 47 and 205:

47. Il est de l'essence des conventions qui consistent á promettre quelque chose, qu'elles produisent, dans la personne qui a fait la promesse, une obligation qui l'oblige à s'en acquitter; d'où il suit

que n'y ayant rien de plus contradictoire avec cette obligation que l'entière liberté qui lui serait laissée de faire ou de ne pas faire ce qu'elle a promis, la convention, qui lui laisserait cette entière liberté, serait absolument nulle par *défaut de lien.* Si donc, par example, je convenais avec vous de vous donner une chose, au cas que cela me plût, la convention serait absolument nulle.

Les jurisconsultes romains pensaient qu'il en était autrement de la convention par laquelle quelqu'un promettait de faire quelque chose *lorsqu'il le voudrait.* Ils pensaient que ces termes ne laissaient pas au choix de celui qui avait fait la promesse, de faire ou de ne pas faire ce qu'il avait promis ; qu'ils ne laissaient à son choix que le temps auquel il le ferait ; et qu'ainsi la convention était valable et obligeait ses héritiers, s'il était mort avant de l'avoir accomplie. L. 46, § 2 et 3, ff. *de verb. oblig.* Mais il y a lieu de croire que cette distinction sultile ne serait point admise parmi nous, et que cette convention ne serait pas plus valable que l'autre.

The author makes a further application of this principle when he comes to treat of conditional obligations.

205. Pour qu'une condition soit valable, et suspende l'obligation sous laquelle elle est contractée, il faut, 4o qu'elle ne détruise pas la nature de l'o-

bligation : telle est la condition qui ferait dépendre l'obligation de la pure et seule volonté de la personne qui s'engage ; comme si je promettais de donner quelque chose à quelqu'un, si cela me plaisait, SI VOLUERO : car l'obligation étant *juris vinculum quo necessitate adstringimur*, et renfermant essentiellement une nécessité de donner ou de faire quelque chose, rien n'est plus contraire à sa nature, que de la faire dépendre de la pure volonté de celui qu'on supposerait la contracter ; et, par conséquent une telle condition ne suspend pas, mais détruit l'obligation qui pèche, en ce cas, par le défaut de lien dont nous avons déjà parlé *suprà*, n. 47 et 48 ; *Nulla promissio potest consistere, quæ ex voluntate promittentis statum capit;* l. 108, § 1, ff. *de verb. oblig.*

Il est contraire à l'essence de l'obligation qu'elle dépende de la pure et seule volonté de celui qu'on supposerait l'avoir contractée ; mais elle peut dépendre de la pure et seule volonté d'un tiers. C'est pourquoi je puis valablement contracter l'obligation de donner ou de faire quelque chose, si une certaine personne tierce y consent ; *l.* 43 et *l.* 44, *de verb. oblig.*

Robinson & Co. *promised to sell*, but Major Hoyt did not *promise to buy*. If he had, one promise would have been a consideration for the other; and, not being defficient in *mutuality*, the contract would have been valid and binding.

But, far from being bound, he expressly provides that the enforcement of the contract shall depend upon the mere will of the Government officer. P. 5, "It is expressly provided that this contract may "be terminated at such time as the Quartermaster "General shall select," etc.—the very condition referred to by Pothier, and in Addison on Contracts, as that which makes the contract a nullity. If the officer had chosen, he might have put an end to the contract in five minutes after it was signed. That it is not likely he would do so, is foreign to the question. For the enquiry concerns the *existence* of the right, and not the probability of its exercise.

TO RECAPITULATE.

1. A usage, to amount to a custom, must be distinguished by antiquity, certainty, uniformity and notoriety; and no one of these qualities is established by the record.

2. The evidence not only fails to establish, for the usage relied on, the character of certainty, but affirmatively shows its uncertainty.

3. The complaint is fatally defective, as it contains no averment of usage to which the testimony, on that head, may be applied.

4. One witness, alone, cannot prove a *custom*, or any other fact depending upon the quality of notoriety.

5. The contract sued on, is couched in language deformed by no ambiguity. As parol evidence cannot make it plainer, that which was offered should have been rejected.

6. By the terms of the contract, only one party is made to promise. Only one then became bound. Both not being bound, the contract is NUDUM PACTUM, and therefore, absolutely void.

EDMOND L. GOOLD,
Counsel for Plaintiffs in error.

Over.

APPENDIX.

Translation of Pothier's Language.

"It is of the essence of agreements which consist in promising something, that they create on "the part of the person promising, an obligation, "compelling him to their performance; whence it "follows, that there being nothing more contradictory to this obligation, than that of giving "him entire liberty to do, or not to do that which "he has promised, an agreement giving this liberty, "would be absolutely null for want of a tie.

"If, therefore, for example, I agree with you to "give you something, in case I please so to do, the "agreement would be absolutely null

"The Roman juris-consults thought otherwise "of an agreement, by which one promises to do "something *when he should choose to.*

"They thought these terms did not leave the "election to him who had promised to do, or not "do, that which he had promised; that they "merely left to his election, the time at which he "should act; and that, therefore, the agreement "was valid, and, in the event of his death, without "performance, binding on his heirs.

"But there is reason to believe this subtle dis-

"tinction would not be recognized among us, and "that this agreement would be no more valid than "the other.

"In order that a condition may be valid, and "suspend the obligation under which it was con- "tracted, it is necessary that it do not destroy the "nature of the obligation. Such is a condition "which makes the obligation depend solely upon "the will of the person who binds himself—as if "I promise to give something to some one, if it "should please me to do so—SI VOLUERO. For the "obligation being *juris vinculum quo necessitate ad- "stringimur*, and involving the necessity of giving "or doing something, nothing is more contrary "to its nature, than that of making it dependent "upon the mere will of him who is supposed to "have contracted it. Consequently, such a condi- "tion does not suspend—it destroys the obligation "which, in this case, is faulty for want of the tie "of which we have already spoken. Supra N., "47 and 48.

"It is contrary to the essence of the obligation "that it depend upon the mere will of him who is "supposed to have contracted; but it may depend "upon the mere will of a third person. Therefore, I "may validly contract the obligation of giving, or "doing something, if a certain third person should "consent to it."

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

F. W. ROBINSON, E. N. ROBINSON, L. L. ROBINSON, AND S. F. BUTTERWORTH, *Plaintiffs in Error*,

vs.

THE UNITED STATES.

No. 143.

In Error to the Circuit Court of the United States for the District of California.

BRIEF FOR THE UNITED STATES.

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No. 143.

In Error to the Circuit Court of the United States for the District of California.

BRIEF FOR THE UNITED STATES.

THE CASE.

This was an action brought by the United States in the circuit court of the United States for the district of California, on the 10th of June, 1869, against F. W. Robinson, E. N. Robinson, L. L. Robinson, and S. F. Butterworth, the plaintiffs in error, on a bond given by them June 8, 1867, conditioned for the performance of an agreement of same date entered into by the said F. W. Robinson and E. N. Robinson, composing the firm of F. W. Robinson & Co., of San Francisco, California, for the delivery of 1,000,000 pounds of barley and 500,000 pounds of straw for the use of troops at certain military posts within that State, between July 1, 1867, and June 30, 1868.

By the terms of the agreement, the supplies mentioned were to be delivered between the dates just stated, at such times and in such quantities as might be required, on the order of Brevet Major Jas. T. Hoyt, assistant quartermaster, or his successor, who was to direct and determine from time to time, within the period aforesaid, what proportion of barley and straw should be delivered at each of the posts referred to—the Government reserving the right to accept such less or to require such greater quantity of either of said supplies than that above specified, as might be needed for consumption at those posts during the same period. The contractors were to be paid at the rate of ninety-five cents per 100 pounds for the barley and $7 per ton for the straw, delivered and accepted, in gold coin or its equivalent in legal currency, payments to be made monthly; and the agreement further provided that, "in case of failure or deficiency in the quantity of barley and straw" contracted to be delivered, the said assistant quartermaster, or his successor, should have the power to supply the deficiency by purchase in open market, and the said firm should pay the difference in cost, if any, in gold coin or its equivalent.

The breaches assigned in the complaint of plaintiffs were, that in the months of January, February, March, April, May, and June, 1868, the said F. W. Robinson and E. N. Robinson neglected and refused to deliver certain quantities of barley, amounting in the aggregate to 327,104 pounds, although the barley was duly demanded of them under the said articles of agreement, and according to the terms thereof, the same

being then and there required for the use of said troops; also, that between the 1st of January and the 30th of June, 1868, the said F. W. Robinson and E. N. Robinson neglected and refused to deliver 204,151 pounds of straw, although the straw was duly demanded of them under the said articles of agreement, and according to the terms thereof, the same being then and there required for the use of said troops; and in consequence of such neglect and refusal, and for the purpose of supplying the deficiencies caused thereby, the plaintiffs were obliged to purchase, and did purchase, for the use of said troops, in open market, and at much greater prices than those named in said articles of agreement, the quantity of barley and straw last above stated; whereby they were injured and sustained damages in the amount of, &c.

The defendants answered, denying generally and specifically the allegations in said complaint contained.

Trial was afterwards had to the court, (a stipulation in writing by counsel for the respective parties, waiving a jury, having been duly filed,) which made a special finding of the facts, and awarded the plaintiffs damages to the amount of $4,048 16, in gold coin, for which judgment was rendered on the 8th of July, 1870.

A bill of exceptions was taken by the defendants; and the cause is now before this court, by writ of error sued out in their behalf, for a review of the rulings of the court below presented by the bill of exceptions, and also of the matter of law involved in the judgment given upon the special finding of facts.

It appears, from the finding of the court below, that the contractors had delivered, under the contract, all the barley required of them between July 1, 1867, and January 1, 1868, and that the whole of this barley was delivered in sacks, which had never been demanded back by or returned to them; but that on the 10th of January, 1868, a requisition having been made upon them for 30,000 pounds of barley, to be delivered at the Presidio, one of the military posts mentioned in the contract, they there tendered that quantity of barley *in bulk*, which the officer in charge of the post declined to receive on the ground that it was not *in sacks;* that thereupon the contractors refused to furnish any more barley and abandoned the contract altogether; that thenceforth, until the expiration of the term of the contract, viz., June 30, 1868, the plaintiffs went into open market, from time to time, as barley and straw were required at the several military posts named in the contract, and purchased at the usual market price the quantities of those articles so required; and that what was paid on the purchases thus made, over and above the contract prices, amounted in the aggregate to the sum hereinbefore stated. (Printed Rec., pp. 7 to 11.)

The court also found as follows:

"At the time the contract in question was made, *it was the usage of the trade in the State of California, and it always had been prior to that time, to deliver barley in sacks, unless it was otherwise expressly specified in the contract.* It was the usage of trade in the State, when barley or other grain was purchased without saying anything about sacks, to deliver in sacks. And in case of the purchase of a specified amount of barley, as one million pounds, it was always expected that it would

be delivered in sacks, unless otherwise specified in the agreement. The market quotations of grain always included the sacks. Grain in this State was then packed by the producer, and all subsequent sales, according to the commercial usage, included the sack, until it finally went to the consumer. The sack usually holds from 100 to 115 pounds; some are smaller and some larger, and, in the sale, it is weighed with the grain. In 1868, sacks cost about 17 cents each. They have sometimes cost as high as 35 cents each. Ordinary sacks weigh from 12 ounces to one pound, but go with the grain to the purchaser at the same price as the grain, according to the usage of the trade in California and San Francisco, when nothing is said about the sacks." *(Ibid.*, p. 11.*)*

The bill of exceptions sets forth, in substance, that to prove a usage to deliver barley in sacks, the plaintiffs called a witness, (Clayton,) and asked him whether he knew the usage of the trade with respect to the delivery of barley. That the defendant "objected to the question and proposed testimony on the ground that it is incompetent to vary the terms of a contract by a usage; also, that it was irrelevant; also, on the ground that it was incompetent to prove the usage at San Francisco, because it is not broad enough in territory, and some of the purchases were for outside of the city; also, because the usage was not set up in the pleading." But that the objections were overruled, and the defendants excepted.

That, upon the testimony of this witness, the court found a usage to deliver barley in sacks, which was obligatory upon the contractors; and that a delivery of 30,000 pounds of barley in bulk, in response to a requisition for 30,000 pounds of barley made in Janu-

ary, 1868, was not in compliance with the contract. To all of which the defendants excepted.

That defendants contended that there was not sufficient evidence of any usage to incorporate into the contract a provision that the barley should be delivered in sacks, but that the court held that the evidence was sufficient in all respects, and found such usage, and that such provision was a part of the contract. To all which the defendants excepted.

That plaintiffs having offered to show, by the same witness, the market price of barley at the time the purchases were made, the defendants objected to the proposed testimony on the ground that it was irrelevant; but that the objection was overruled, and the defendants excepted. (*Ibid.*, pp. 13 and 14.)

POINTS.

I.

The known and established usage of trade, prevailing in the place where a contract is made respecting matters to which such usage relates, must be considered to be tacitly annexed to the terms of the contract, unless it is expressly excluded.

Addison on Cont., pp. 851–2.

Chitty on Cont., 10th ed., by Perkins, pp. 18, 19.

1. Usages of this character are always presumed to be within the contemplation of the parties to such contracts, and they become engrafted thereon with like

effect as if they had formed a part of the express stipulations contained therein.

If an agreement is made by virtue of which something is to be done in a particular locality, and the same act or service is uniformly done or performed in a certain way, by persons of like occupation in that place, it is just and reasonable to suppose that the intention of the parties was that it should be done in that way and in no other.

Croucher *vs.* Wilder, 98 Mass., 325.

The reason for this supposition is nearly the same as that for supposing that the common language which they use is to be taken in its common meaning. And the rule that the meaning and intent of the parties govern, wherever this is possible, comes in and operates. Hence an established custom may even add to a contract stipulations not contained in it, on the ground that the parties may be supposed to have had these stipulations in their minds as a part of their agreement, when they put upon paper or expressed in words the other part of it.

2 Parsons on Cont., 5th ed., p. 337.

"In all contracts," says Coleridge, J., in Brown *vs.* Byrne, 3 E. & B., 715, "as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding. The contract, in truth, is partly

express and in writing, partly implied or understood and unwritten."

And see, also, Hutton *vs.* Warren, 1 M. & W., 466.
Humfrey *vs.* Dale, 7 E. & B., 275.
Conner *vs.* Robinson, 2 Hill, (S. C.,) 354.
Dalton *vs.* Daniels, 2 Hilton, 474.

2. The only qualification of the principle is, that the usage must not be repugnant to, or inconsistent with, the written contract; for, as the office of the usage is simply one of exposition, to ascertain the understanding of the parties with reference to the terms of the contract, where a repugnancy or inconsistency exists the express stipulation of the parties will necessarily prevail.

To exclude the usage, then, it must be shown to be such as, if expressed in the written contract, would make the latter insensible, or inconsistent. Thus, as is observed by the court in Humfrey *vs.* Dale, cited above, to warrant bacon to be "prime singed," adding, "that is to say, slightly tainted," (Yates *vs.* Pym, 6 Taunt., 446,) or to insure all the boats of a ship, and add, "that is to say, all not slung in the quarter," (Blackett *vs.* Royal Ex. Ass. Co., 2 C. & J., 244,) and other cases of the sort scattered through the books, would be instances of contracts in which both the two facts could not have full effect given to them if written down; and therefore, when one part only is expressed, it would be unreasonable to suppose that the parties intended to include the other also.

Applying this test to the contract with Robinson & Company: if to the express stipulation of these parties

to "deliver one million pounds of first quality of clean barley," there is added "in sacks," it cannot be reasonably maintained that this would make the agreement inconsistent or repugnant.

II.

Accordingly, parol evidence of the usage of a particular trade, where such usage is not inconsistent with the written contract, is always admissible.

1. The principle on which the evidence is admissible is, that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them; and it is to show precisely what the contract is, that the evidence is received. For the contract being presumed to be made with the usage understood to be a term in it, to exclude the usage would be to exclude a material term of the contract, and must lead to an unjust decision.

Humfrey *vs.* Dale, 7 E. and B., 275.

"The minds of lawyers," observes Lord Campbell, C. J., in the case just cited, "are under a different influence from that which, in spite of them, will always influence the practice of traders; which practice creates the usages of trade. The former desire certainty, and would have a written contract express all its terms,

and desire that no parol evidence beyond it shall be receivable. But merchants and traders, with a multiplicity of transactions pressing on them, and moving in a narrow circle, and meeting each other daily, desire to write little, and leave unwritten what they take for granted in every contract. In spite of the lamentations of the judges, they will continue to do so; and in a vast majority of cases, of which courts of law hear nothing, they do so without loss or inconvenience; and, upon the whole, they find this mode of dealing advantageous, even at the risk of occasional litigation. It is the business of courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them."

2. But it is objected by the learned counsel for plaintiffs in error (see his brief, p. 22) that the testimony as to usage in this case was inadmissible for want of an averment in the pleadings.

The cause of action was founded, not upon the usage, but upon the bond and the alleged breach of the condition thereof, and it was sufficiently set forth in the complaint. No authority is cited by the counsel where it has been ruled that, in a suit on a written contract, a usage of trade must be pleaded before it can be received in evidence to explain the instrument sued on, while the contrary has been directly and distinctly held.

See Lowe *vs.* Lehman, 15 Ohio State, 169.

In the case just cited, the court remarks: "It would be impracticable to apply the rule that special customs must be specially pleaded, to cases like the present. Pleadings would be almost endless, if parties were bound to set out in them all the shades and variations in the meaning of terms employed in contracts. The rule seems to be to require each party to come to the trial prepared to meet questions of that kind without special notice."

Usages of trade may be given in evidence under a plea of the general issue, and need not be pleaded specially.

2 Archbold's N. P., 208.

2 Stephens's N. P., 1549, note (2.)

3. Another objection urged is, that the testimony of one witness is insufficient to establish a custom. (See brief of counsel for plaintiff in error, p. 26.)

But as a *rule of law*, governing the proof of usages of trade, this proposition cannot be sustained upon principle or authority.

If a single witness testifies fully and explicitly to the existence of a usage, and is not contradicted, it cannot be assumed as a legal conclusion that the proof is insufficient.

Marston *vs.* Bank of Mobile, 10 Ala., 284.

There does not appear to be anything in the character of the fact that a usage in a given branch of the trade exists, which renders it important that such fact should be established by more than one competent witness; and many cases may arise in which the admin-

istration of justice would be needlessly delayed and burdened by requiring two or more witnesses.

Vail *et al. vs.* Rice, 1 Selden, 158.

"We cannot lay it down as a positive rule, that more than one witness is required to prove the existence of a custom or usage, before such usage or custom can become an element of contracts. No statute has prescribed such a rule, and we are not able to perceive in the nature of the question a necessity for so radical a departure from general principles."

Partridge *vs.* Forsyth, 29 Ala., 203.

The cases cited in the brief referred to, (to which may also be added, as belonging to the same class, Parrot *vs.* Thatcher, 9 Pick., 430, and Burr & Co. *vs.* Sickles & Co., 17 Ark., 434,) properly considered, cannot be regarded as affirming any such rule.

The question of the sufficiency of the testimony of the witness offered to establish the usage in this case, in the absence of any positive rule of law on the subject, was therefore exclusively for the court, which tried the issue between the parties in place of a jury, to determine; and its finding, based on that testimony, cannot be reviewed here.

III.

The bond sued on is valid and binding upon the obligors.

Counsel on the other side contend (see brief of plaintiffs in error, p. 40) that the agreement, for the performance whereof the bond is conditioned, is destitute of mutuality and without consideration, and consequently

is *nudum pactum* and absolutely null. This objection will not avail.

In the first place, the agreement, being under seal, imports a consideration. So that if the action had been directly upon the agreement itself, it would have been unnecessary to aver a consideration in the declaration or complaint.

Moore *vs.* Waddle, 34 Cal., 147.

At common law, a party was not permitted to plead a want of consideration as a defence to an action upon a sealed instrument; the presumption of the existence of a consideration being absolute and conclusive. But by statute, in California, the rule in this respect has been modified, so far as to permit the want of consideration to be *pleaded*. It has not, however, altered the presumption which still accompanies the instrument, but allows it to be rebutted in the *answer*.

McCarty *vs.* Beach, 10 Cal., 463.

The record, in this case, does not show that any plea of want of consideration was set up in the answer; and there was no other way in which that defence could be admitted. The objection cannot now be raised.

In the next place, the allegation made in said brief of a want of mutuality of obligation, has no foundation in fact. By the terms of the agreement, the contractors were to deliver barley and straw of good quality at certain posts, at such times and in such quantities, between July 1, 1867, and June 30, 1868, *as might be required for the use of the troops*. On the other hand, the Government was to pay certain rates for each pound of barley and each ton of straw delivered and accepted under the contract at those posts. The contractors

were not to deliver except upon the order of the quartermaster; but it was agreed that the quartermaster should direct and determine, from time to time, *within that period*, what proportion of the said articles should be delivered at each post; and when and as often as that officer so directed and determined, there existed an obligation upon the Government to accept the supplies from the contractors (at least such quantity as might be required for consumption at the various posts) unless they were found by a board of survey to be "unfit for issue, or of a quality unfit for that contracted for." (See art. 5th of contract, Record, p. 3.) By an express provision, however, the agreement might be terminated at any time by the Quartermaster General.

Both parties to the agreement appear to have contracted with reference to the wants of the troops, at the various posts named, within the period referred to; and while it was obligatory upon the contractors to furnish such of the supplies mentioned as might be required for consumption at those posts during that period, it was equally so upon the Government to accept and pay for them at the rates specified, unless condemned by a board of survey, as long as the contract lasted. Hence there was mutuality in the agreement; and it cannot be regarded as a naked undertaking by one party only.

See Cherry *vs.* Smith, 3 Humph., 19.

GEO. H. WILLIAMS,
Attorney General.

B. H. BRISTOW,
Solicitor General.